SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [redacted] 200

THE TOLEDO RAILWAYS & LIGHT COMPANY,
PLAINTIFF IN ERROR,

vs.

[illegible] AND RALPH L. [illegible], AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF [illegible], DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE [illegible] DISTRICT OF NEW YORK.

[illegible]

[illegible]

(24,853)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 570.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
PLAINTIFF IN ERROR,

vs.

WALTER L. HILL AND RALPH L. SPOTTS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HARFORD B. KIRK, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 3, 1916.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, plaintiffs and The Toledo Railways & Light Company, defendant, a manifest error hath happened, to the great damage of the said The Toledo Railways & Light Company, as is said and appears by its complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the said place before the Justices aforesaid, on the 29th day of July, 1915, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William I. Grubb, United States
2 District Judge, Southern District of New York, this 1st day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and thirty-ninth.

ALEX GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, Second Circuit.

The foregoing writ is hereby allowed.

W. I. GRUBB,
U. S. District Judge.

3 [Endorsed:] L. 13–100. United States Supreme Court. The Toledo Railways & Light Company, plaintiff in error (defendant below) against Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, defendants in error (plaintiffs below). (Copy.) Writ of Error. Frueauff & Robinson, attorneys for plaintiff in error. Office and P. O. address, 60 Wall Street, Borough of Manhattan, New York. Filed

U. S. District Court S. D. of N. Y., July 2, 1915. Service of a copy of the within writ of error is hereby admitted this 13th day of July, 1915. Kendall & Herzog, attorneys for defendant in error.

4 Supreme Court, County of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, April 20", 1914.

KENDALL & HERZOG,
Attorneys for Plaintiffs.

Office & P. O. Address: 233 Broadway, Borough of Manhattan, City of New York.

5 Supreme Court, County of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

Complaint.

The plaintiffs, by Kendall & Herzog, their attorneys, complain of the defendant and allege as follows:

I. On or about the 5th day of September, 1907, Letters Testamentary on the Estate of Harford B. Kirk, late of the County of New York, deceased, were duly granted to the said plaintiffs by the Surrogates' Court in and for the County of New York, and they thereupon duly qualified. The said Letters Testamentary have not been revoked, and the plaintiffs ever since the granting of said letters testamentary have acted and are now acting as such executors.

II. The said plaintiff, Ralph L. Spoots, is a resident of the City and State of New York; the plaintiff, Walter L. Hill, is a resident of Boston, in the State of Massachusetts.

III. On information and belief, the said defendant at the times hereinafter mentioned was and now is a foreign corporation created and existing under the laws of the State of Ohio.

6 IV. On or about August 10th, 1901, the defendant duly made, signed, executed, sealed and delivered, for value received, the several coupon bonds of said defendant hereinafter mentioned.

V. The said coupon bonds bear date on the said 10th day of August, 1901, and purport to be some of the bonds of a series of coupon bonds numbered 1 to 12000 inclusive, for the sum of $1,000. each, and are made payable in gold coin of the United States of America of the then standard of weight and fineness, on the 1st day of July, 1909, at the fiscal office of said defendant in the City of New York, with interest thereon at the rate of 4% per annum payable at the said fiscal office upon the first days of January and July in each year until the payment of the principal amount thereof, upon presentation of the interest coupons thereto attached, in each of which defendant promises to pay the bearer the sum of twenty ($20) Dollars, as aforesaid.

VI. Said bonds are made payable to the bearer or the registered owner, if said bonds should be registered, and are therein stated to be secured by a certain deed of trust or mortgage bearing even date with said bonds, duly executed and delivered by said defendant to The United States Mortgage and Trust Company of the City of New York, as trustee; and it is expressed in the said bonds that they respectively shall not become valid or obligatory until they shall have been authenticated by the certificate of The United States Mortgage and Trust Company of New York City, trustee, endorsed

7 upon them.

VII. Plaintiff's testator, at the time of his death, was the owner and holder by delivery of twenty-five of said coupon bonds, hereinbefore mentioned and described, respectively numbered 9126, 9128, 9519, 9520, 9521, 10057, 10058, 10059, 10060, 10061, 10062, 10063, 10064, 10331, 10332, 10475, 10476, 10477, 10478, 10479, 10480, 10481, 10482, 10483, 10484, which bonds were not and are not registered.

VIII. Each of the said coupon bonds so owned by plaintiff's testator, was and is duly authenticated by said certificate indorsed thereon and duly signed by the said trustee.

IX. The said plaintiffs duly demanded payment of the said twenty-five bonds and the coupons thereto attached, at the fiscal office of the said company in New York, on or about the first day of July, 1909, but payment was not made of any of said bonds, nor has any of them, nor any part of them, hitherto been paid, and three (3) coupons for Twenty Dollars ($20) each, attached to each of said bonds, are still wholly unpaid.

X. The said sum of Twenty-six thousand five hundred ($26,500) Dollars and interest from July 1st, 1909, is justly due to plaintiffs from the defendant over and above all counterclaims known to these plaintiffs or either of them.

Wherefore, plaintiffs demand judgment against the defendant for the sum of Twenty-six thousand, five hundred ($26,500) 8 Dollars, with interest thereon from the first day of July, 1909, together with costs and disbursements of this action.

KENDALL & HERZOG,
Attorneys for Plaintiffs.

Office & P. O. Address: 233 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Ralph L. Spotts, being duly sworn, deposes and says that he is one of the plaintiffs named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

RALPH L. SPOTTS.

Subscribed and sworn to before me this 20th day of April, 1914.
ARTHUR S. LEVY,
Commissioner of Deeds, City of New York, #15.

9 [Endorsed:] Supreme Court, New York County. Walter L. Hill and Ralph L. Spotts, as Executors, &c., of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways and Light Company, Defendant. Copy. Summons and Complaint. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City.

10 *Petition for Removal Into United States District Court.*

County Clerk's Index No. 17894, Year 1914.

Supreme Court, County of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

To the Honorable the Supreme Court of the State of New York in and for the County of New York:

The Toledo Railways & Light Company, the defendant above named, appearing specially and for the sole and single purpose of presenting this petition, respectfully shows to this Court as follows:

I. That the above entitled action is a suit of a civil nature at law or in equity, and was commenced by the issuance and service of a

summons on or about the 29th day of June, 1914. That said summons, together with the complaint herein, was served in the City of New York upon Frank W. Frueauff, as vice-president of the defendant The Toledo Railways & Light Company, on the 29th day of June, 1914. That said suit is pending undetermined in this court, and that the time within which the defendant The Toledo Railways & Light Company is required by the laws of this state and the rules of this court to answer or plead to the declaration or complaint of the plaintiff has not yet expired.

11 II. That this action has been commenced by the plaintiffs as executors of the last Will and Testament of Harford B. Kirk, deceased, against the defendant to recover the sum of Twenty-six Thousand Five Hundred Dollars, ($26,500), with interest from July 1st, 1909, upon allegations in the complaint that plaintiffs' testator, at the time of his decease, was the owner and holder, by delivery, of a certain twenty-five (25) coupon bonds of the defendant of the sum of One Thousand Dollars ($1,000) each, dated on or about August 10th, 1901, payable on July 1st, 1909, with interest at the rate of four per cent. (4%) per annum, payable semi-annually upon the presentation of the interest coupons therefor, thereto attached, and that said bonds have not been paid and the interest thereon is in arrears from July 1st, 1909. That the matter and amount in dispute in the above entitled action exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000).

III. That the controversy in said suit is between citizens of different states. That the plaintiff Ralph L. Spotts is and was at the time of the commencement of said suit, and at all times since has been a resident of the Borough of Manhattan, City, County and State of New York, and that the plaintiff Walter L. Hill is and was at the time of the commencement of said suit and at all times since has been a resident of the City of Boston, State of Massachusetts, and that Harford B. Kirk, plaintiff's testor, was, prior to the time of his decease, a resident of the County and City of New York, and that letters testamentary on the estate of said Harford B. Kirk were duly granted to said plaintiffs by the Surrogate's Court in and

12 for the County of New York, and the plaintiffs thereupon duly qualified, all as appears from the allegations of the complaint herein and from the records in said Surrogate's Court in and for the County of New York, and that the defendant, The Toledo Railways & Light Company, at the time of the commencement of said suit, was and ever since has been and still is a foreign corporation, organized, created and existing under and by virtue of the laws of the State of Ohio, and a non-resident of the State of New York.

IV. That your petitioner herewith presents a bond of good and sufficient surety for its entering into the District Court of the United States, for the Southern District of New York, within thirty days from the date of the filing of this petition, a certified copy of the record of this suit and for paying all costs that may be awarded by

the said District Court if the said District Court shall hold that this suit was wrongfully or improperly removed thereto.

That your petitioner further offers to furnish such other and further security or do such other act or thing or both as may be reasonably required in the premises.

V. That an order to show cause and for a stay is asked for because there is not sufficient time to give the usual notice of motion prior to the time when defendant is required to plead, answer or otherwise move herein, which said time expires on the 19th day of July, 1914.

That no previous application has been made for the order or relief herein asked.

Wherefore, your petitioner, pursuant to the provisions of the Statutes of the United States, prays this Honorable Court to
13 proceed no further in this cause, to accept this petition and the said bond, and to cause the records herein to be removed into the said District Court of the United States, in and for the Southern District of New York, and that your petitioner have such other and further relief as the facts warrant and as may be just, and and your petitioner will ever pray.

Dated, New York City, July 15th, 1914.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
By FRANK W. FRUEAUFF, *Vice-President.*

FRUEAUFF & ROBINSON,
Attorneys for Defendant, Appearing Specially.

Office and P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

14 STATE OF NEW YORK,
County of New York, ss:

Frank W. Frueauff, being duly sworn, says: That he is the Vice-President of The Toledo Railways & Light Company, the defendant and petitioner above named; that he has read the foregoing petition and known the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason this verification on behalf of the defendant The Toledo Railways & Light Company, is made by deponent and not by the said defendant is that said defendant is a foreign corporation, and that deponent is an officer thereof, to wit, its Vice-President.

FRANK W. FRUEAUFF.

Sworn to before me this 15th day of July, 1914.
EDNA A. STOKES,
Notary Public, Kings County, No. 342.

Certificate filed in New York County No. 808; New York Register No. 5470.

15 Supreme Court Order No. 445.

Index Number 17894, Year 1914.

New York Supreme Court, County of New York, Special Term, Part I.

Order on Removal.

WALTER L. HILL, &c.,
against
TOLEDO RAILWAYS & LIGHT COMPANY.

Present: Hon. Leonard A. Giegerich, Justice.

The following papers numbered 1 to — read on this motion defaulted this 21 day of July, 1914.

	Papers numbered.
Order to Show Cause and Affidavits Annexed & Bond.....	1 to 3

Upon the foregoing papers this motion to remove to United States Court granted on default. Bond approved.

L. A. G., *J. S. C.*

Dated July 21, 1914.
Filed Jul- 21, 1914.

16 *Bond on Removal.*

Know all men by these presents, That the National Surety Company, a New York Corporation, having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, in the City of New York, and State of New York, is held and firmly bound unto Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, in the penal sum of Five Hundred Dollars, for the payment whereof well and truly to be made unto the said Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, their heirs, representatives and assigns, it binds itself, its representatives and assigns, firmly by these presents.

Upon these conditions: The Toledo Railways & Light Company being about to petition the Supreme Court of the State of New York, held in and for the County of New York for the removal of a certain cause therein pending, wherein the said Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, are the plaintiffs and the said The Toledo Railways & Light Company the defendant, to the District Court of the United States, for the Southern District of New York.

Now, if the said The Toledo Railways & Light Company shall enter in such District Court of the United States within thirty days

from the date of filing said petition a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by said the District Court of the United States, if said District Court shall hold that such suit was wrongfully or improperly removed thereto and also shall appear and enter special bail in such suit if special bail was originally requisite therein then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, the said National Surety Company, has caused its corporate seal to be hereto affixed, and these presents to be signed by its duly authorized officers on the 15th day of July 1914.

In the presence of

——— ———.

NATIONAL SURETY COMPANY.
By WM. A. THOMPSON,
Resident Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

17 STATE OF NEW YORK,
County of New York, ss:

On the 15th day of July in the year 1914, before me personally came Wm. A. Thompson to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he is the Resident Vice-President of The National Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

PAUL P. MARCONE,
Notary Public, etc.

Copy of By-law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, 1908, a quorum being present, the following By-Law was adopted:

"Article XIII. Sec. 1. Signatures required.—All bonds, recog-"nizances, or contracts of indemnity, policies of insurance, and all "other writings obligatory in the nature thereof, shall be signed by "the President, a Vice-President, a Resident Vice-President or Attor-"ney-in-Fact, and except when signed by an Attorney-in-Fact shall "have the seal of the Company affixed thereto, duly attested by the "Secretary, an Assistant Secretary or Resident Assistant Secretary. "All Vice-Presidents and Resident Vice-Presdents shall each have "authority to sign such instruments, whether the President be absent "or incapacitated or not; and the Assistant Secretaries and Resident

"Assistant Secretaries shall each have authority to seal and attest "such instruments, whether the Secretary be absent, or incapacitated "or not. All such instruments executed as herein provided shall be "as binding upon the Company as if the same were signed by the "President and duly sealed and attested by the Secretary."

[Endorsed:] New York Supreme Court, County of New York. Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railway & Light Company, Defendant. Removal Bond. National Surety Company, Surety. I approve of the within Bond, and of the sufficiency of the surety. Leonard A. Giegerich, Justice Supreme Court, State of New York.

STATE OF NEW YORK,
County of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company this 15th day of July, 1914.

E. M. McCARTHY,
Resident Assistant Secretary.

18 STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the preceding with the original Record of Removal to U. S. Court with Bond and approval in re Walter L. Hill &c., plaintiffs, vs. The Toledo Railways & Light Co. Deft. on file in my office, and that the same are correct transcripts therefrom and the whole of such originals.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 18th day of August, 1914.

[SEAL.] WILLIAM F. SCHNEIDER, *Clerk.*

19 *Order to Show Cause Why Service of Summons & Complaint Herein Should Not Be Vacated, etc.*

In the District Court of the United States for the Southern District of New York.

WALTER H. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Upon the annexed affidavits of Frank R. Coates, verified the 11th day of September, 1914, Robert Burns, verified the 11th day of September, 1914, and of Frank W. Frueauff, verified the 11th day of September, 1914, and upon all the pleadings, papers and proceedings herein and on motion of Frueauff & Robinson, attorneys for the defendant, The Toledo Railways & Light Company, appearing specially for the purpose of moving to vacate the service of the summons and complaint herein, it is

Ordered that the plaintiffs or their attorneys show cause before this Court at a term thereof to be held at the Post Office Building in the City, County and State of New York on the 16th day of September, 1914, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the service of the summons and complaint herein should not be vacated and all proceedings had thereon set aside on the ground that the attempted service of the summons and complaint herein on the defendant corporation, by delivering a copy of the same to Frank W. Frueauff, an officer thereof, in the City, County and State of New York, was not sufficient to confer on this Court jurisdiction over the person of the defendant and was not due service upon said defendant corporation inasmuch as said corporation is organized under the laws of the State of Ohio, maintains no office in New York State, does no business and owns no property therein and why such other and further relief in the premises as may be just, should not be granted. And it is

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Further ordered that the service of this order to show cause and the affidavits upon which it is granted by delivering a copy of the same at the office of the attorneys for the plaintiffs herein on or before the 14th day of September, 1914, shall be sufficient. And it is

Further ordered that all proceedings herein be stayed pending the determination of this motion and that the defendant's time to plead herein or to make such motion relative to the complaint as it may be advised, be and the same hereby is extended until five days after the entry of an order hereon and the service of notice of entry thereof.

Dated, September 12, 1914.

J. M. MAYER, *J. D. C.*

21 *Affidavit of Frank R. Coates in Support of Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER H. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF OHIO,
County of Lucas, ss:

Frank R. Coates being duly sworn, deposes and says:

First. That he is President of the defendant company, The Toledo Railways & Light Company, which appears herein specially for the purposes of this motion only.

Second. That the defendant company, The Toledo Railways & Light Company, is a corporation organized and existing under the laws of the State of Ohio, with its principal office in the City of Toledo, County of Lucas and State of Ohio; that said corporation, as stated in its Articles of Incorporation, is located in the City of Toledo, Lucas County and State of Ohio, and its principal business is there transacted; that said corporation, as stated in said Articles of Incorporation, is formed for the purpose of constructing, maintaining, operating, extending, purchasing, acquiring, leasing and owning street railroads and railroads operated as street rail-
22 roads to be operated by electric power together with all the property real, personal and mixed, and all franchises, rights and privileges respecting the use and operation of the same, and for all purposes incidental thereto in the City of Toledo, Lucas County, Ohio, and of doing all matters and things proper to such business, including the manufacturing, procuring, providing, furnishing, conveying and distributing of all power, heat and light that is now or may hereafter be found to be proper, convenient or desirable in the carrying out of such purpose, and incidental to such purpose, to use, maintain and operate all electric light and power property, rights, privileges and franchises, which said corporation may lease or purchase.

Third. That all of the properties of The Toledo Railways & Light Company are located in the said State of Ohio in or in the vicinity of the City of Toledo in said State and all of said Company's business is transacted in said State.

Fourth. On information and belief that the plaintiffs above named undertook to institute this action in the Supreme Court of the State of New York by an alleged service of summons and complaint upon one Frank W. Frueauff as a Director and Vice-President of said defendant company, The Toledo Railways & Light Company, by delivering a copy of said summons and complaint herein to said Frank

W. Frueauff in the City, County and State of New York, on or about the 29th day of June, 1914. That thereafter defendant company herein caused such steps to be taken that said alleged action so instituted as aforesaid was removed to the District Court of the United States for the Southern District of New York on or about the 16th day of July, 1914, and a certified copy of the record was
23 thereafter duly filed in said District Court of the United States for the Southern District of New York, all as appears from the record herein.

Fifth. That the Board of Directors of said Company consists of nineteen (19) members, all of whom reside without the State of New York, with the exception of three (3) directors of the defendant company who reside in said State; that said Frank W. Frueauff, to whom a copy of the summons and complaint in this action was delivered, although a Director and Vice-President of the Company, is not now and has never been actively engaged in or connected with the executive management of the defendant company, nor does he now or has he ever performed any executive duties in connection with the office he now holds.

Sixth. Deponent states the fact to be that the defendant company has not now nor has it had for the last five years past an office in the State of New York nor in any place except the City of Toledo, State of Ohio; that said defendant company does not now nor did it ever transact any business in the State of New York nor in any state except the State of Ohio; that said defendant company has not now nor has it had since the month of October, 1913, any property in the State of New York nor in any State except the State of Ohio.

FRANK R. COATES.

Sworn to before me this 11th day of September, 1914.

[SEAL.] A. C. VAN DRIESEN,
Notary Public in for Lucas County, Ohio.

My commission expires March 11th 1917.

Certificate of Clerk of Common Pleas, Lucas Co. as to notary authority attached.

24 *Affidavit of Frank W. Frueauff in Support of Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER R. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Frank W. Frueauff being duly sworn, deposes and says:

First. That he is Vice-President of the defendant company, The Toledo Railways & Light Company, which appears specially herein for the purposes of this motion only.

Second. That the defendant, The Toledo Railways & Light Company, is a corporation, organized and existing under the laws of the State of Ohio, with its principal office in the City of Toledo, State of Ohio, as appears from the affidavit of its President, Frank R. Coates, annexed hereto; that it is engaged in the business of managing and operating street railroads and electric properties; that, as appears from the said affidavit of Frank R. Coates, all the business and property of the Company is confined to the State of
25 Ohio.

Third. That the plaintiffs above named undertook to institute this action in the Supreme Court of the State of New York by an alleged service of summons and complaint upon deponent as a Director and Vice-President of said defendant company, The Toledo Railways & Light Company, by delivering a copy of said summons and complaint herein to deponent in the City, County and State of New York, on or about the 29th day of June, 1914. That thereafter defendant company herein caused such steps to be taken that said alleged action, so instituted as aforesaid, was removed to the District Court of the United States for the Southern District of New York, and a certified copy of the record was thereafter duly filed in said District Court of the United States, for the Southern District of New York, all as appears from the record herein.

Fourth. Deponent became a Director of the defendant corporation *on* or about April, 1913, and one of the Vice-Presidents of said Company *on* or about January, 1914; that since his election as Director and Vice-President of said corporation, deponent has never been actively engaged in or connected with the executive management of defendant company, nor does deponent now nor has he ever performed any executive duties in connection with the offices he now holds; and deponent has never represented the defendant corporation in any business or transaction in the State of New York.

Fifth. Deponent alleges, on information and belief, that at the

time of the attempted institution of this suit and subsequent thereto, the defendant company had no office or place of business in the State of New York, nor did it transact any business in the State of
26 New York, nor has it any property in said State.

FRANK W. FRUEAUFF.

Sworn to before me this 11th day of September, 1914.
[SEAL.] THOMAS H. FAIR,
Notary Public.

New York County No. 1054.
New York Register No. 5104.

27 *Affidavit of Robert Burns in Support of Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER H. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Robert Burns being duly sworn, deposes and says:

First. That he is associated with the firm of Frueauff & Robinson, the attorneys for the defendant, The Toledo Railways & Light Company, appearing specially for the purposes of this motion only, and is familiar with the matters and proceedings in this action.

Second. That the defendant, The Toledo Railways and Light Company, is a corporation, organized and existing under the laws of the State of Ohio, with its principal office in the City of Toledo, State of Ohio, as appears from the affidavit of its President, Frank R. Coates, annexed hereto; that it is engaged in the business of managing and operating street railroads and electric properties; that, as appears from the said affidavit of Frank R. Coates, all the
28 business and property of the Company is confined to the State of Ohio.

Third. That the plaintiffs above named undertook to institute this action in the Supreme Court of the State of New York by an alleged service of summons and complaint upon one Frank W. Frueauff as a Director and Vice-President of said defendant Company. The Toledo Railways & Light Company, by delivering a copy of said summons and complaint herein to said Frank W. Frueauff in the City, County and State of New York, on or about the 29th day of June, 1914. That thereafter defendant company herein caused such steps to be taken that said alleged action so instituted as aforesaid was removed to the District Court of the United States for the Southern District of New York, and a certified copy of the

record was thereafter duly filed in said District Court of the United States, for the Southern District of New York, all as appears from the record herein.

Fourth. That as more particularly appears from the affidavit of Frank R. Coates, the President of the defendant Company hereto annexed, at the time of said attempted service of the summons and complaint as aforesaid, said defendant transacted no business in the State of New York, owned no property therein and maintained no office in said State; that all of said defendant's business and operations were at said times confined to the State of Ohio. That this order to show cause and a stay is asked for, for the reason that prior to the determination of this application, the time of the defendant to plead herein or to make such other motion relative to the complaint as it may be advised, may expire.

That no previous application has been made for the relief
29 herein asked or any part thereof.

ROBERT BURNS.

Sworn to before me this 11th day of September, 1914.

[SEAL.] HARRIET C. THIRKIELD,
Notary Public, Kings Co., No. 149.

Certif. filed in New York County, No. 47.
New York Register No. 5117.

30 [Endorsed:] L-13-100. United States District Court, Southern District of New York. Walter H. Hill and Ralph L. Spotts as Executors of the Last Will & Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. (Copy.) Affidavits and Order to Show Cause. Frueauff & Robinson, Attorneys for Defendant—appearing specially. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Service of the within affidavits and order to show cause by receipt of copies thereof is admitted this 14 day of September, 1914. Kendall & Herzog, Attorneys for Plaintiffs. Filed Oct. 7, 1914. U. S. District Court, S. D. of N. Y.

31 *Affidavit of Paul M. Herzog in Opposition to Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Paul M. Herzog, being duly sworn, says:

I am a member of the firm of Kendall & Herzog, attorneys for the plaintiffs above named.

This affidavit is made in opposition to defendant's motion to vacate the service of the summons and complaint herein.

The action was brought to recover the sum of Twenty-six thousand five hundred ($26500) Dollars, moneys due upon certain coupon bonds heretofore issued by this defendant and owned by plaintiffs' testator, as appears from the complaint (Paragraph "V").

The bonds in question bear date of August 10th, 1901, and are payable July 1st, 1909, at the fiscal office of the defendant in the City of New York. By their terms, the bonds are stated to be secured by a certain deed of trust or mortgage bearing even date with said bonds, and executed and delivered by this defendant to
32 the United States Mortgage and Trust Company of the City of New York, as trustee; and it is expressed in the bonds that they should not become valid or obligatory until they should have been authenticated by the Certificate of the United States Mortgage and Trust Company of the City of New York as such trustee (Paragraph "VI" of the complaint).

As appears further from the said complaint, each of the bonds in suit is so authenticated by said certificate indorsed thereon and duly signed by the said trustee (paragraph "VIII" of the complaint).

The plaintiffs' testator was a resident of the City and County of New York, and the Letters Testamentary upon his estate were issued by the Surrogates' Court, New York County (paragraph "I" of the complaint).

It is admitted by the moving papers herein that until October, 1913, more than four years after the bonds became due, the defendant had property within the State of New York (paragraph "Sixth" of the affidavit of Frank R. Coates, the President of the defendant corporation).

So that we have a resident of the City of New York obtaining bonds of a foreign corporation here in New York, and payable at its fiscal office in the City of New York. In other words, a contract is entered into by a resident of New York in the City of New York,

and which by its terms is to be wholly performed within the City of New York, and defendant admits that when this contract was to be closed, i. e., when the bonds were to be paid on July 1st, 1909, it had property within the State of New York, and was thus doing
33 business here. When payment was demanded, however, defendant failed to pay any part of the moneys due, and when this suit is commenced, it makes the claim that inasmuch as it is a foreign corporation and has now no assets within the State of New York, it should not be compelled to defend itself in the Courts of any State other than those of Ohio, the State in which it was incorporated.

It is respectfully submitted, however, that the contract having been made in New York by a resident of New York, and being one which by its terms was to be, and but for the failure of the defendant, would have been fully performed in New York, that the plaintiff Executors should not be turned out of the Courts of this State.

Poor's Manual of Public Utilities, which is the standard reference work on the business and operation of Companies such as this, and which deponent has caused to be examined, states that the Doherty Operating Company of New York City has assumed the management of the properties of the defendant Company. It seems difficult to understand how the Doherty Operating Company can manage defendant's business in New York City without bringing the defendant under our jurisdiction. Frank W. Fruehauff the affiant and Vice President of defendant is actively associated with said Doherty & Co.

The action was originally commenced in the Supreme Court, New York County, and upon application of this defendant was removed to this Court, and the defendant should not now be heard to say that this Court has no jurisdiction; that because it has now no property within the State of New York, the service of the summons and complaint herein upon its Vice President and one of the Directors was therefore defective.

34 All of which is respectfully submitted.

PAUL M. HERZOG.

Sworn to before me this 29th day of September, 1914.

JULIUS WALERSTEIN,
Notary Public, New York County; New York County No. 4165; *New York Register No.* 5174.

35 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways and Light Company, Defendant. Copy. Affidavit in Opposition to Motion. Kendall & Herzog, Attorneys for Plaintiffs, 27 William Street, Borough of Manhattan, N. Y. City.

36 *Affidavit of Frank W. Frueauff in Support of Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Frank W. Frueauff, being duly sworn, deposes and says:

First. That he is a member of the firm of Henry L. Doherty & Co., public service financiers and experts.

Second. That in February, 1913, the securities of The Toledo Railways & Light Company, the defendant above named, were re-organized, pursuant to which a corporation known as Toledo Traction, Light & Power Company was organized under the laws of the State of Maine, to acquire and which corporation did acquire, all the securities of said The Toledo Railways & Light Company owned by those holders who consented to said re-organization.

Third. That said firm of Henry L. Doherty & Co., is actively interested in Cities Service Company, a corporation organized and existing under the laws of the State of Delaware, which cor-
37 poration is a holding company engaged in the business of owning public service securities of various operating companies located in this country and Canada, of many of which operating companies, deponent is Vice-President; that at the time or subsequent to said re-organization of The Toledo Railways & Light Company, said Cities Service Company acquired an interest in the Common Capital Stock of Toledo Traction, Light & Power Company amounting to approximately thirty per cent. (30%) of said Common Capital Stock; that the total capital stock of said Toledo Traction, Light & Power Company is Nine million, two hundred thousand dollars ($9,200,000) par value of Common and Eight million dollars ($8,000,000) par value of Preferred Stock.

Fourth. That since the re-organization and prior thereto, the business of The Toledo Railways & Light Company, the defendant above named, was and is conducted by its executive officers and managers. On information and belief, that all of the business of The Toledo Railways & Light Company is confined to the State of Ohio and particularly to the City of Toledo and its vicinity; that the Articles of Incorporation of said The Toledo Railways & Light Company state that it is formed for the purpose of doing business in the City of Toledo, Lucas County; that from time to time, the firm of Henry L. Doherty & Company is consulted as public service experts by the executives of The Toledo Railways & Light Company on questions of financial, engineering and other problems for which said firm re-

ceives a consideration, but deponent states the fact to be that no member of said firm of Henry L. Doherty & Co., nor any one em-
38 ployed by them, is actively engaged in the executive management of said The Toledo Railways & Light Company other than the fact that Henry L. Doherty and Frank W. Frueauff, two of the members of said firm, and one Milan R. Bump, who is associated with said firm, are three of the nineteen directors of said The Toledo Railways & Light Company, and deponent is one of the Vice-Presidents of said Company; that none of said persons receive any salary as directors or Vice-President, or in any other capacity whatsoever from The Toledo Railways & Light Company.

Fifth. Deponent further states the fact to be that although a director and a Vice-President of said corporation, he is not actively engaged in the executive management of the Company and has never represented said defendant company in any transactions in the State of New York.

Sixth. Deponent further states that to the knowledge and belief of deponent, the defendant corporation has never transacted any business in the State of New York. Deponent alleges, on information and belief, that for convenience of certain bond-holders of the corporation, the defendant company caused interest on certain of its bonds to be paid at the office of Kean, Van Cortland & Co., predecessor of the present firm of Kean, Taylor & Co., in the City of New York; that no such interest has been paid at said office of Kean, Taylor & Co., nor at any office in the State of New York since the year 1909 and that since said year or the year immediately succeeding, the firm of Kean, Van Cortland & Co., ceased to act in any capacity whatsoever for said defendant company and has never since acted in any capacity for or on behalf of said Company.

Seventh. On information and belief, that The Toledo Rail-
39 ways & Light Company did not sell any of the bonds described in the complaint in the State of New York; that all of the bonds which were eventually offered for sale to the public, were purchased from The Toledo Railways & Light Company by the firm of Kean, Van Cortland & Co., and by said firm were sold to its customers; that the interest on said bonds was payable in New York at the office of said Kean, Van Cortland & Co., for the convenience of the customers of said firm who might become holders of said bonds.

Eighth. On information and belief, that at the time of the institution of this action, the defendant company was transacting no business, had no office and no property in the State of New York.

Ninth. Deponent states the fact to be that at the time of the institution of this action, the bonds described in the complaint were not listed upon the New York Stock Exchange, and further states, on information and belief, that said bonds were never so listed.

Tenth. That the sources of deponent's information and the grounds of his belief as to all matters not stated upon his knowledge, are records of The Toledo Railways & Light Company and reports of its officers and agents.

FRANK W. FRUEAUFF.

Sworn to before me this 2nd day of Oct. 1914.
THOMAS A. FAIR.
Notary Public, N. Y. C. 1054.

40 [Endorsed:] District Court of United States Southern District of New York. Walter L. Hill and Ralph L. Spotts as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. (Copy.) Affidavit in Support of Motion. Frueauff & Robinson, Attorneys for Defendant, Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York.

41 *Affidavit of Paul M. Herzog in Opposition to Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of and Trustees under the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,

against

THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Paul M. Herzog, being duly sworn says:

1st. I have read the affidavit of Frank W. Freueauff verified October 2nd, 1914 submitted in the above entitled action. The attention of the Court is called to the following facts:

The Toledo Railways and Light Company, the defendant above named, has not been reorganized, and is still an existing corporation. The allegation in paragraph Second of said affidavit of Frank W. Frueauff merely says that the securities were reorganized, whatever that may mean.

It appears that there is a firm of Henry L. Doherty & Conpany which is interested in the so called City Service Company. It also appears that there is a corporation called the Doherty Operating Company. In the maze of interrelation between these various corporations, it is difficult to determine for what corporation an

42 individual who is an officer of all of them is acting, but it is not presumptuous to infer that he doing business for all of them when his activities touch upon the business interests of the operating companies even though he may claim that his activity is merely concerned with his official duties as an officer of a holding company.

The attention of the Court is also called to the following extract from a certain circular called "Utilities Improvement Company—Plan and Subscription Agreement, New York, October 15th, 1912" issued in

October 1912, (and, as deponent believes, since carried into practical operation, though without any consent ever given on the part of plaintiffs) by the firm of Henry L. Doherty & Company:

"Our arrangement on the Toledo properties is with the Bondholders' and Stockholders' Committees and must be ratified by the majority of the stockholders of the old Company. We are to receive 25% of the Common Stock for agreeing to direct the management of the company for a period of five years and for underwriting (or in other words agreeing to buy if not bought by the old stockholders);

$1,040,000. 6% Cumulative Preferred Stock
and
$4,160,000. Common Stock
For $1,040,000. Cash.

This stock however is to be first offered to the old stockholders on the basis of:

$1,000 6% Preferred Stock
$4,000 Common Stock
For $1,000. Cash.

Whatever portion of this underwriting is not taken by the old stockholders will be taken by this Company. Therefore, the amount of common stock in Toledo Light and Railways Company which this Company will acquire under this plan will not be less than 25% and may be as much as 77%. The Common Stock is to be placed in a voting trust which will contract with us for the management of the property".

43 Deponent believes that management in New York City of its holding Company must entail "doing business in New York City" by the defendant corporation.

2nd. So far as the allegations in paragraphs Sixth and Seventh are concerned, deponent begs to submit to the Court an accurate copy, personally compared with an original bond, of one of the bonds in suit in this action (a copy if this bond being hereto annexed and marked Exhibit A), and calls the attention of the Court to the statement in the bond that it is payable, principal and interest "at the fiscal office of said corporation in the City of New York"; that the coupon is similarly payable; that the bond is endorsed "principal and interest payable in the City of New York"; that the bond is registered with the United States Mortgage and Trust Company of the City of New York, and is not valid until so registered; that it was prepared by the American Bank Note Company in the City of New York, a fact important to consider in view of the fact that this is necessary to entitle the bonds to be dealt in on the New York Stock Exchange.

3rd. Deponent further calls attention to the fact that the firm of Kean, Taylor & Company was a New York Banking house, and that it is almost impossible to believe that the bonds were pur-
44 chased by that firm in any place other than in the City of New York. That it is undoubted that the bonds were purchased by the plaintiff's testator in the City of New York.

4th. That as deponent is informed and believes, the defendant Company has not paid any of the coupons or any of the principal of any of the bonds, of the issue of which plaintiffs' bonds are a part, any where since 1909, and that it is because of this default and failure on their part that this action is brought.

PAUL M. HERZOG.

Sworn to before me this 9th day of October, 1914.

ARTHUR S. LEVY,
Commissioner of Deeds, New York City, No. 15.

45 EXHIBIT "A."

$1000.

Number 9520. Number 9520.

United States of America.

The Toledo Railways and Light Company.

Four Per Cent Consolidated First Mortgage Gold Bond.

Know all men by these presents, that The Toledo Railways and Light Company, a corporation created and existing under the laws of the State of Ohio, for value received, is indebted to the bearer hereof, or, if this bond be registered, then to the registered owner hereof, in the sum of One Thousand Dollars ($1000), which it promises to pay on the first day of July, A. D. One Thousand Nine Hundred and Nine, (A. D. 1909), at the fiscal office of said Company in the City of New York, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, to the bearer hereof or to the registered owner of this bond (if registered), with interest thereon from and after the first day of July, A. D. One Thousand Nine Hundred and One, (A. D. 1901), at the rate of Four Per Cent (4%) per annum payable in the gold coin aforesaid, semi-annually on the first days of January and July in each year at the fiscal office of said Company in the City of New York, without deduction for any tax or taxes which said Company may be required to pay thereon, or retain therefrom under any present or future law of the United States of America, or any
46 state, country or municipality thereof, upon presentation and surrender of the interest coupons hereto attached as they respectively become payable.

This bond is one of a series of Twelve Thousand (12,000) bonds, numbered consecutively from one (1) to twelve thousand (12,000), both inclusive, all of like tenor, amount, date and effect, bonds numbers ten thousand and one, (10,001) to twelve thousand (12,000), both inclusive, being reserved as provided in said mortgage, to which reference is hereby made, for future extensions, betterments and improvements. The payment of the principal and in-

terest of all of said bonds is secured by a certain trust deed or mortgage of even date herewith, duly executed and delivered by said The Toledo Railways and Light Company, of Toledo, Ohio, to the United States Mortgage and Trust Company of the City of New York, as Trustee, conveying to said Trustee in trust to secure the payment of all said bonds, with interest, equally, all the real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of said Company, including all property and rights thereafter to be acquired by it or consolidated with it, to which mortgage reference is hereby made, and each and all of the terms, conditions and agreements in which, including the right to declare the principal due upon six months' default as in said mortgage provided, are hereby made a part hereof, and this bond is issued, accepted and held subject to the same.

The holder hereof shall have no recourse to the liability of the incorporators or the present or future stockholders of said Company, or of any successor company for the payment of the principal and interest of this bond or any part thereof or the performance of any of the covenants or agreements in said mortgage contained, but hereby expressly waives the same.

47 This bond shall not be obligatory until authenticated by the certificate endorsed hereon of the United States Mortgage and Trust Company of New York City, Trustee, and is redeemable at any time at 102½ and interest, in the manner provided in said mortgage. This bond shall pass by delivery, unless registered.

In testimony whereof, said The Toledo Railways and Light Company has caused these presents to be signed by its President or Vice-President and Secretary, and its corporate seal to be hereto affixed and the accompanying sixteen (16) interest coupons to be authenticated by the fac-simile signature of its Secretary on this 10th day of August, One Thousand Nine Hundred and One.

THE TOLEDO RAILWAYS AND LIGHT COMPANY,

By ALBIN E. LANG, *President.*

FRED S. BORTON, *Secretary.*

$1,000.

State of Ohio. $1,000.

American Bank Note Company, New York.

Across the face of this bond there *is* printed the following figures: 1000.

(Reverse side of the above bond.)

Registration.

This bond may be registered in the owner's name on books kept by said United States Mortgage and Trust Company at its office in

the City of New York, such registry being noted on the bond by said Trust Company's Secretary or Transfer Agent, after which no transfers shall be valid, unless made on the Trust Company's
48 books by the registered owner in person or by attorney in fact thereunto duly authorized in writing, and such transfer noted on said bond, as provided for the original registry. But the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transferrable by delivery, but may be again and from time to time registered as before. When this bond is registered, the coupons hereto attached shall pass by delivery, as though no registry had been made, but at such registry the unpaid coupons may be surrendered, detached from said bond and cancelled, after which the interest shall be payable only to the registered owner of the bond.

No writing on this Bond, except by an officer of this Company.

Date of Registry.	In Whose Name Registered.	Transfer Agent.
Jan. 6, 1902.	Cyril Johnson.	United States Mortgage & Trust Co.

CALVERT BREWER,
Ass't Treasurer.
CALVERT BREWER,
Secretary.

(*Coupon.*)

14.

On the first day of July, 1908, The Toledo Railways and Light Company will pay the bearer at the fiscal office of said Company in the City of New York, Twenty *$20* Dollars ($20) in gold coin, being the semi-annual payment of interest then due on its four per cent (4%) Consolidated First Mortgage Gold Bond of like number herewith.

No. 9520.

FRED S. BORTON,
Secretary American Bank Note Co., N. Y.

49 (Back of above Bond:) 9520. The Toledo Railways and Light Company. $1,000 4% Consolidated First Mortgage Gold Bond. Principal Due July 1st, 1909. Interest Payable January 1st & July 1st. Principal and Interest Payable in the City of New York. Trustees Certificate. This bond is one of the series of bonds described in the mortgage within referred to. United States Mortgage and Trust Company, Trustee. By W. P. Elliot, Secretary. American Bank Note Company, New York.

50 & 51 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts as Executorx &c., of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways and Light Company, De-

fendant. Copy. Affidavit. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City.

52 *Memorandum of Hough, J., in Motion to Set Aside Service of Summons and Complaint.*

United States District Court, Southern District of New York.

WALTER L. HILL et al., as Executors,
vs.
THE TOLEDO RAILWAYS & LIGHT COMPANY.

Motion to Set Aside Service of Summons and Complaint

Memorandum

The difficulties which have arisen regarding the service of answering and replying affidavits are annoying and indeed distressing. I do not recollect giving any directions as to the hour at or before which any paper was to be served.

It is of course my desire that all the facts which seem to any counsel important shall be spread upon the records of the Court.

I have therefore concluded to accept as one of the papers in the case the affidavit of Mr. Frueauff, verified October 2, 1914, and I have put it on file.

The plaintiffs may file any replying affidavit or affidavits, and they may do this at any time before 1 P. M. of Saturday next, October 10th.

53 Decision of this motion so far as I am concerned will not, however, wait for any replying affidavit, nor does it depend on anything contained in Mr. Frueauff's answering affidavit.

The exact point is novel, but my opinion about it depends on admitted or incontrovertible facts.

The defendant issued certain bonds and promised to pay those bonds and the interest upon the same in the City of New York.

The contract evidenced by the bonds became, therefore, a New York contract.

Obviously the contract could not be performed,—the admitted debt could not be regularly paid, unless the defendant corporation did business within the State of New York.

It has maintained offices within the State of New York; Mr. Frueauff is one of them.

If, therefore, any action had been begun against this Company (at least in relation to these bonds) on or before July 1, 1909, and service had been effected upon the Vice President of the Company within the State of New York, he being a resident of that State, it seems to me that the service would have been perfect and exactly within Lumbermen's Insurance Co. vs. Meyer, 197 U. S., 407.

What is the difference now? The defendant Company is still in existence, it still has directors and a Vice President resi-
54 dent within the State of New York; but it is asserted that no business is or can be done in the State of New York because it refused and neglected to pay a debt which it had promised to pay in this City on July 1, 1909.

It seems to me that this is a very dishonest argument and that the defendant having (in effect) agreed to engage in business in New York for the purpose of paying its debts, should be conclusively presumed to have kept its own agreement until such debt is paid or merged in judgment.

Exactly the argument made here might have been made in the Lumbermen's Insurance Company case. The Insurance Company might have admitted that as long as it contemplated paying its losses incurred in New York it was doing business in New York, but just as soon as it refused to pay on its own policy then it was not doing business in New York.

The motion to set aside the service is denied and an order embodying such denial and fixing a time for answer has been entered by me.

C. M. HOUGH, *D. J.*

Oct. 7, 1914.

55 *Order of Hough, J., Denying Motion to Set Aside Service of Summons and Complaint.*

United States District Court, Southern District of New York.

L. 13—100.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendants.

This cause having come on to be heard upon a motion to set aside the service of a summons and complaint herein, Messrs. Frueauff and Robinson appearing specially in favor of said motion, and Messrs. Kendall and Herzog opposing the same on behalf of the plaintiffs, and the affidavits of Frank R. Coates, verified September 11, 1914, Robert Burns, verified the same date, Frank W. Frueauff, likewise verified the same date, and a second affidavit of Frank W. Frueauff verified October 2d, having been filed in support of said motion, and the affidavit of Paul M. Herzog, verified September 29th, 1914, having been filed in opposition thereto; and the plaintiffs having received leave from this Court to file such replying affidavit or affidavits as they may be advised at any time before 1 P. M. of October 10, 1914 (such affidavits so to be filed to be regarded as a portion of the motion papers herein), and due deliber-

ation having been had, and the Court being of opinion that the admitted facts are sufficient to justify decision, it is

56 Ordered: that said motion be and the same hereby is denied. And it is

Further ordered; That the defendant is granted leave to answer or demur herein on or before October 15, 1914; in other respects the order to show cause herein is vacated.

Oct. 7, 1914.

C. M. HOUGH, *D. J.*

57 [Endorsed:] District Court of the United States for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Order. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City. Filed U. S. District Court S. D. of N. Y., Oct. 7, 1914. Copy Received Oct. 8/14. Frueauff & Robinson.

58 *Answer.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendants.

The above named defendant, by Frueauff & Robinson, its attorneys, in answer to the complaint of the plaintiffs, herein respectfully alleges:

First. It denies that it has any knowledge or information as to each and every allegation contained in Paragraphs I, II, VII and VIII of said complaint sufficient to form a belief thereof.

Second. It denies that it has any knowledge or information as to whether the plaintiffs demanded payment of said or any of the twenty-five bonds and coupons, as alleged in Paragraph I of the complaint sufficient to form a belief thereof; and it denies each and every allegation contained in Paragraph X of said complaint.

For a first, separate and complete defence to the alleged cause of action set forth in the complaint, the defendant above named reiterates and realleges the denials hereinbefore set forth and further respectfully alleges:

59 Third. That the bonds described in the complaint herein recite that the payment of the principal and interest of all of said bonds is secured by a certain deed of trust or mortgage of even date of said bonds, duly executed and delivered by said defendant to The United States Mortgage & Trust Company of the City of New York as Trustee, conveying to said Trustee in trust

to secure the payment of all of said bonds with interest equally, all the real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of said defendant, including all property and rights thereafter to be acquired by it or consolidated with it, to which mortgage reference is thereby made and each and all the terms, conditions and agreements in which mortgage are thereby made a part of said bonds and said bonds are issued, accepted and held subject to the same.

Fourth. That in Article X of said mortgage it is provided that no holder of any bond or coupon secured thereby shall have any right to institute any suit, action or proceeding for the foreclosure of said indenture or for the execution of any trust thereof without first giving to the Trustee written notice of the fact that default has occurred and continued as provided in said mortgage, nor unless also the holders of twenty-five per cent. (25%) in amount of the then outstanding bonds secured thereby shall have requested the Trustee in writing and shall have afforded it reasonable opportunity, either itself to proceed to exercise the powers granted by said mortgage or to institute such action, suit or proceeding in its own name, nor unless also they shall have offered to the Trustee satisfactory security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby.

60 Fifth. On information and belief that the plaintiffs herein have not given the Trustee written notice of the fact that default has occurred or continued as provided in said bond, nor have the holders of twenty-five per cent. (25%) in amount of the bonds outstanding at the time of said alleged default, so requested the Trustee in writing, nor was there afforded to said Trustee, reasonable opportunity, either itself to proceed to exercise the powers granted in said mortgage or to start such action, suit or proceeding in its own name, nor was said Trustee offered satisfactory security or indemnity against the costs, expenses or liabilities to be incurred therein or thereby.

For a second, separate and complete defence to the alleged cause of action set forth in the complaint, the defendant above named reiterates and realleges the denials hereinbefore set forth and further respectfully alleges:

Sixth. That on or about the first day of November, 1912, a plan of re-organization was formulated in respect of the outstanding securities and obligations of said defendant company. That among said outstanding securities of said defendant company included within the scope of said plan of re-organization, was the series of bonds described in the complaint herein. That by the provisions of said plan of re-organization, it was proposed to organize a new company which was to acquire all the outstanding stock and obligations of the defendant company, the holders of which would consent to said plan, and to issue in exchange therefor, the stock and bonds of the outstanding securities and obligations of the defendant company. That said plan provided for the issuance to the

61 holders of the series of bonds described in the complaint assenting to said plan, the Six Per Cent. Cumulative Pre-

ferred Capital Stock of said new company at a par value equal to the principal amount of the bonds of said holders. That pursuant to said plan, an agreement of re-organization was entered into between J. R. Nutt, Norman B. Ream, C. Ledyard Blair, John Sherwin, H. P. McIntosh, William B. Hale, William E. Hutton and William H. Netherland, constituting the Re-organization Committee, parties of the first part, the holders of said securities and obligations of the defendant company, parties of the second part, and The New York Trust Company of the City of New York, party of the third part; that approximately ninety-five per cent. (95%) of the holders of the bonds of the series described in the plan, assented to said plan of reorganization and became parties of said Re-organization Agreement as provided by the terms thereof and received the Six Per cent. Cumulative Preferred Capital Stock of said new company which was thereafter formed under the name of Toledo Traction, Light & Power Company in exchange for the bonds so held by them; that, as provided by said Re-organization Agreement as modified, the right to deposit bonds of the series mentioned in the complaint and receive in exchange therefor the Six Per cent. Cumulative Preferred Capital Stock of said Toledo Traction, Light & Power Company, expired February 1, 1913.

Seventh. That after the completion of said reorganization, pursuant to the terms of said agreement, the said Toledo Traction, Light & Power Company offered to the holders of the bonds of the series described in the complaint, who had not become parties to said re-organization agreement, to issue in exchange for the
62 bonds so held by them the Six Per Cent. Cumulative Preferred Capital Stock of Toledo Traction, Light & Power Company on the same basis as provided in said Re-organization Agreement.

Eighth. On information and belief, that the plaintiffs above named accepted said offer and agreed to transfer the bonds held by them or subject to their control which are the said bonds described in the complaint herein, to said Toledo Traction, Light & Power Company, in exchange for said Six Per Cent. Cumulative Preferred Capital Stock. That thereafter said plaintiffs herein failed to so deliver their shares pursuant to said agreement and have ever since failed so to do although said Toledo Traction, Light & Power Company has been ready and willing and still offers to issue in exchange for said shares its Six Per Cent. Cumulative Preferred Capital Stock to an amount equal to the principal amount of said bonds.

For a third, separate and complete defence to the alleged cause of action set forth in the complaint, the defendant above named reiterates and realleges the denials hereinbefore set forth and further respectfully alleges:

Ninth. That the plaintiffs above named attempted to institute this action and to serve process in the State of New York upon the defendant herein by delivering within said state a copy of the summons and complaint to one Frank W. Frueauff, a Vice-President and Director of the Company, who resides therein. That at the time of the attempted institution of this action, Toledo Railways

& Light Company owned no property in New York State, maintained no office and transacted no business herein. Upon information and belief, that the attempted service of said process was invalid and ineffective and conferred no jurisdiction upon this Court
63 over the person of the defendant and that by reason thereof, this Court has no jurisdiction over the person of the defendant in this action.

Wherefore, defendant demands judgment that the complaint be dismissed with the costs and disbursements of this action.

FRUEAUFF & ROBINSON,
Attorneys for Defendant.

Office & Post Office Address, No. 60 Wall Street, Borough of Manhattan, New York City.

64 STATE OF NEW YORK,
County of New York, ss:

FRANK W. FRUEAUFF, being duly sworn, deposes and says: That he is Vice-President of The Toledo Railways & Light Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof and that the same is true to his own knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by the defendant is because the defendant is a foreign corporation and deponent, an officer thereof, to wit, the Vice-President.

FRANK W. FRUEAUFF.

Sworn to before me this 10th day of October, 1914.

THOMAS H. FAIR,
Notary Public New York County, No. 1054;
New York Register No. 5104.

65 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. Answer. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Copy of the within answer received this 10th day of October, 1914. Kendall & Herzog, Attorneys for Plaintiff. Filed U. S. District Court, S. D. of N. Y., October 13, 1914.

66 *Extract from Minutes of Trial.*

At a Stated Term of the District Court of the United States, for the Southern District of New York, Held at the United States Court-rooms, in the U. S. Court-house and Post-Office Building, in the Borough of Manhattan, City of New York, on the 18th Day of June, in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

Present: Honorable William I. Grubb, District Judge.

L. 13-100.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased,
vs.
THE TOLEDO RAILWAYS & LIGHT COMPANY.

Now come the plaintiffs by Paul M. Herzog their attorney and moves the trial of this cause. Likewise comes the defendant by its attorney Watson B. Robinson, and objects to the Court proceeding with the cause for want of jurisdiction of the person of the defendant. Overruled. Thereupon a jury is duly empaneled and sworn and the cause proceeds to trial. Defendant's attorney states that he will take no part in the trial except to object to the jurisdiction. At the close of the testimony, plaintiff's attorney moves for a direction of a verdict. By direction of the Court verdict for the plaintiff for $35,987.00.

Defendant excepts.

An extract from the minutes.

ALEX. GILCHRIST, JR., *Clerk.*

67 *Judgment.*

United States District Court, Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

The above entitled action having duly come on for trial at a Stated Term of this Court in and for the Southern District of New York, at the Court House, Borough of Manhattan, City of New York, on the 18th day of June, 1915, before the Honorable William I. Grubb and a jury, and the above parties having appeared, the plaintiffs by Kendall & Herzog, their attorneys, and the defendant by Frueauff & Robinson, Esqs., its attorneys, and the issues having been duly tried and the jury having, under the direction of the Court,

returned a verdict in favor of the plaintiffs, and against the defendant for the sum of Thirty-five thousand nine hundred eighty-seven dollars ($35,987), and the costs of the plaintiffs having been duly taxed in the sum of Forty-nine and 5/100 dollars ($49.05).

Now, on motion of Kendall & Herzog, attorneys for the plaintiffs, it is

Adjudged that the plaintiffs Walter L Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B.
68 Kirk, deceased, recover of the defendant, The Toledo Railways and Light Company, the sum of Thirty-five thousand nine hundred eighty-seven dollars, ($35,897), together with the sum of Forty-nine and 5/100 dollars, costs as taxed, amounting in all to the sum of thirty-six thousand and thirty-six and 5/100 dollars, and that the said plaintiffs have execution therefor.

Judgment signed and entered this 26th day of June, 1915.

ALEX. GILCHRIST, JR., *Clerk*.

69 [Endorsed:] United States District Court, Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways and Light Company, Defendant. Copy. Judgment. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City. Filed June 26, 1915. U. S. District Court, S. D. of N. Y.

70 *A Stipulation.*

United States District Court, Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

It is hereby stipulated and agreed, by and between the attorneys for the parties hereto, that plaintiffs' Exhibit No. 1 consisted of original Letters Testamentary, issued by the Surrogates' Court in and for the County of New York, on September 5, 1907 to Walter L. Hill and Ralph L. Spotts, Executors, granting to said executors the administration of all and singular the goods, chattels and credits of Harford B. Kirk, deceased.

It is further stipulated and agreed that since the commencement of this action and before trial thereof Walter L. Hill, one of the executors above named, died, but, nevertheless, this writ of error is, by consent of the parties, being prosecuted under the title of the action as originally instituted and as above set forth.

It is further stipulated and agreed that plaintiffs' Exhibit No. 2 consisted of twenty-five (25) Four Per Cent Consolidated First Mortgage Gold Bonds of The Toledo Railways & Light Company, in the principal amount of one thousand dollars ($1,000)
71 each, dated August 10, 1901, numbered 9126, 9128, 9519-9821, 10057-10064, 10331-10332, 10475-10484, and to

which were attached coupons maturing July 1, 1908, January 1, 1909 and July 1, 1909. All of said bonds are identical in form (except that each bear- a distinctive number), said form being as follows:

"United States of America,
State of Ohio.

No.—. $1,000.

The Toledo Railways and Light Company.

Four Per Cent. Consolidated First Mortgage Gold Bond.

Know all men by these presents, that The Toledo Railways and Light Company, a corporation created and existing under the laws of the State of Ohio, for value received, is indebted to the bearer hereof, or, if this bond be registered, then to the registered owner hereof, in the sum of one thousand dollars ($1,000), which it promises to pay on the first day of July, A. D. one thousand nine hundred and nine (A. D. 1909), at the fiscal office of said Company in the City of New York, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, to the bearer hereof, or to the registered owner of this bond (if registered), with interest thereon from and after the first day of July, A. D. one thousand nine hundred and one (A. D. 1901), at the rate of four per cent. (4%) per annum payable in the gold coin aforesaid, semi-annually on the first days of January and July in each year at the fiscal office of said Company in the City of New York, without deduction for any tax or taxes which said Company may be required to pay thereon, or retain therefrom under any present or future law of the United States of America, or of any State, County or municipality thereof, upon presentation and surrender of the interest coupons hereto attached as they respectively become payable.

This bond is one of a series of twelve thousand (12,000) bonds, numbered consecutively from one (1) to twelve thousand (12,000), both inclusive, all of like tenor, amount, date and effect, bonds numbers ten thousand and one (10,001) to twelve thousand (12,000), both inclusive, being reserved as provided in said mortgage, to which reference is hereby made, for future extensions, betterments and improvements. The payment of the principal and interest of all of said bonds is secured by a certain trust deed or mortgage of even date herewith, duly executed and delivered by said The Toledo Railways and Light Company of Toledo, Ohio, to the United States Mortgage and Trust Company of the City of New York, as Trustee, conveying to said Trustee in trust to secure the payment of all of said bonds, with interest, equally, all the real and personal property, rights, privileges, grants, contracts, securities, choses in
72 action and franchises of said Company, including all property and rights thereafter to be acquired by it or consolidated with it, to which mortgage reference is hereby made, and each and all of the terms, conditions and agreements in which, including

the right to declare the principal due upon six months' default as in said mortgage provided, are hereby made a part hereof, and this bond is issued, accepted and held subject to the same.

The holder hereof shall have no recourse to the liability of the incorporators or the present or future stockholders of said Company, or of any successor Company, for the payment of the principal and interest of this bond or any part thereof, or the performance of any of the covenants or agreements in said mortgage contained, but hereby expressly waives the same. This bond shall not be obligatory until authenticated by the certificate endorsed hereon of the United States Mortgage and Trust Company of New York City, Trustee, and is redeemable at any time at 102½ and interest, in the manner provided in said mortgage. This bond shall pass by delivery, unless registered.

In testimony whereof, said The Toledo Railways and Light Company has caused these presents to be signed by its President or Vice-President and Secretary, and its corporate seal to be hereto affixed and the accompanying sixteen (16) interest coupons to be authenticated by the fac simile signature of its Secretary on this 10th day of August, one thousand nine hundred and one.

THE TOLEDO RAILWAYS AND LIGHT COMPANY,
By ALBION E. LANG, *President.*
[CORPORATE SEAL.] FRED S. BARTON, *Secretary.*

(*Form of Coupon.*)

No.—. $20.00.

On the first day of — The Toledo Railways and Light Company will pay the bearer at the fiscal office of said Company in the City of New York Twenty Dollars ($20.00) in gold coin, being the semi-annual payment of interest then due on its four per cent. (4%) Consolidated First Mortgage Gold Bond of like number herewith.

FRED S. BARTON, *Secretary.*

(*Trustee's Certificate.*)

This bond is one of the series of bonds described in the mortgage within referred to.

UNITED STATES MORTGAGE AND TRUST COMPANY, *Trustee,*
By W. D. ELLIOTT, *Secretary.*"

73 The following endorsements appear on the back of said bonds:

"The Toledo Railways & Light Company $1,000 4% Consolidated First Mortgage Gold Bond. Principal due July 1st, 1909. Interest payable January 1st & July 1st. Principal and interest payable in the City of New York."

"American Bank Note Company, New York."

"Registration. This bond may be registered in the owner's name on books kept by said United States Mortgage and Trust Company at its office in the City of New York, such registry being noted on the bond by said Trust Company's Secretary or Transfer Agent, after which no transfers shall be valid, unless made on the Trust Company's books by the registered owner in person, or by attorney in fact thereunto duly authorized in writing, and such transfer noted on said bond, as provided for the original registry. But the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transferable by delivery, but may be again and from time to time registered as before. When this bond is registered the coupons hereto attached shall pass by delivery, as though no registry had been made, but at such registry the unpaid coupons may be surrendered, detached from said bond and cancelled, after which the interest shall be payable only to the registered owner of the bond."

"No writing on this bond except by an officer of this Company.

Date of registry. In whose name registered. Transfer agent.

It is further stipulated and agreed that all of said bonds are duly signed and countersigned.

It is further stipulated and agreed that this stipulation may be printed in the record on this writ of error in place of printing the exhibits in full.

Dated, New York, July 10th, 1915.

KENDALL & HERZOG,
Attorneys for Plaintiff.
FRUEAUFF & ROBINSON,
Attorneys for Defendant.

74 [Endorsed:] United States District Court, Southern District of New York. Walter L. Hill and Ralph L. Spotts as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. Stipulation. Filed Jul. 14 1915. U. S. District Court, S. D. of N. Y.

75 *Certificate as to Question of Jurisdiction.*

In the District Court of the United States, for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,

AGAINST

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Certificate by the Honorable William I. Grubb, one of the Judges of the District Court of the United States, for the Southern District

of New York, Second Circuit, pursuant to Section 238 of the Judicial Code.

I, William I. Grubb, one of the Judges of the District Court of the United States, for the Southern District of New York, Second Circuit, hereby certify to the Supreme Court of the United States that the issues in the above entitled action came on for trial, in the above entitled Court, on the 18th day of June, 1915.

That prior to the trial of said action the defendant duly moved at a term of the District Court for an order quashing the service of the summons herein and dismissing this action for want of personal jurisdiction over the defendant, and that on the 7th day of October, 1914, an order was entered in the said District Court by direction of Honorable Charles M. Hough, District Judge, denying said motion to quash service and dismiss said action for want of personal jurisdiction over the defendant.

76 That at the opening of the trial hereinbefore mentioned, the defendant duly renewed its motion to quash service herein and to dismiss said action for want of personal jurisdiction, and said motion as thus renewed was denied upon authority of said prior order entered by direction of District Judge Hough and because made after answer filed on the merits. That the attorney for the defendant thereupon stated that he would take no part in the trial except to object to the Court's jurisdiction, and at proper subsequent stages of the trial renewed said motion, which was denied.

That thereafter, at the close of the plaintiffs' case, the Court directed the jury to return a verdict in favor of the plaintiffs and against the defendant, in the sum of thirty-five thousand nine hundred and eighty-seven dollars ($35,987), pursuant to which direction a verdict was so returned, and a final judgment was thereafter and on the 26th day of June, 1915 entered in favor of the plaintiffs and against the defendant in the sum of thirty-six thousand and thirty-six and 5/100 dollars ($36,036.05).

I further certify that the defendant duly filed in this Court its petition praying that a writ of error may issue out of the Supreme Court of the United States, under the provisions of Section 238 of the Judicial Code to review said judgment, and an order allowing such writ of error has been duly entered.

I, therefore, in accordance with the provisions of Section 238 of the Judicial Code, being Judiciary Act of Congress of the United States, approved March 3, 1911, do hereby certify to the Supreme Court of the United States, that the jurisdiction of this Court over the person of the defendant The Toledo Railways & Light

77 Company is in issue, and that the following question of jurisdiction is certified to the Supreme Court of the United States for decision:—

The question whether the defendant by reason of its issuing certain bonds, the principal whereof was payable in the City of New York, in 1909, at the fiscal office of the Company in said city, is doing business within the State of New York, so as to be amenable to service of process within said state; whether the defendant by reason of its issuing bonds, the principal whereof was payable in

the City of New York in 1909 at the fiscal office of the Company in said city, should be conclusively presumed to have maintained said fiscal office in the City of New York until said bonds were paid, and thereby rendered itself amenable to service of process within the State of New York, made by leaving the same with a vice-president of the Company, residing within the State of New York but not representing the defendant within the State of New York in respect to any business conducted in said state, even though the Company, at the time the action was brought, maintained no office in the State of New York, owned no property in New York State, transacted no business in said state and was not represented in said state by any person, firm or corporation; whether the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant should have been granted upon all the facts contained in the record and whether the motion of the defendant to quash the service of the summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the
78 defendant when said motion was renewed at the opening of the trial should have been granted in view of the fact that the defendants had filed an answer on the merits, even though said answer set up as a defense the lack of the Court's jurisdiction over the person of the defendant. Dated at New York, July 1st, 1915.

W. I. GRUBB,
United States District Judge.

79 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Certificate. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed Jul- 9, 1915. U. S. District Court S. D. of N. Y.

80 *Petition for Writ of Error.*

In the District Court of the United State for the Southern District of New York.

At Law.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant,

Now comes The Toledo Railways & Light Company, defendant herein, and says: That on the 26th day of June, 1915, the District Court of the United States, for the Southern District of New York, entered a judgment herein in favor of the plaintiffs and against this

defendant, in which judgment, and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the material portions of the record, proceedings and papers in this cause, as specified under Rule Eighth of the Supreme Court, duly authenticated, may be sent to the said Supreme Court of the United States.

FRUEAUFF & ROBINSON,
Attorneys for Defendant.

Office and P. O. Address, No. 60 Wall St., Borough of Manhattan, City of New York.

81 [Endorsed:] L. 13-100. In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Petition for Writ of Error. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court. S. D. of N. Y., July 2,1915.

82 *Order Allowing Writ of Error and Supersedeas.*

In the District Court of the United States, for the Southern District of New York.

At Law.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

This 1st day of July, 1915 comes the defendant, by Frueauff & Robinson, its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the material portions of the record, proceedings and papers upon which the judgment herein was rendered, as specified under Rule VIII of the Supreme Court, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises. Upon consideration whereof the Court does allow the writ of error upon the defendant's giving bond according to law, in the sum of thirty-eight thousand five hundred dollars ($38,500), which shall operate as a supersedeas bond.

W. I. GRUBB,
District Judge.

83 [Endorsed:] L. 13–100. In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Order Allowing Writ of Error and Supersedeas. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court S. D. of N. Y., July 2, 1915.

84 *Assignments of Error.*

In the District Court of the United States, for the Southern District of New York.

At Law.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Now comes the said defendant The Toledo Railways & Light Company, by Frueauff & Robinson, its attorneys, and says that in the record, proceedings and orders and in the final decree and judgment entered thereon, whereby the plaintiffs recovered judgment for the amount demanded in their complaint, there is manifest error, and that the defendant has been denied its just rights by said proceedings and decree; and the defendant hereby assigns and sets out the following errors, namely:

1. The court erred in holding that the defendant by reason of its issuing certain bonds, the principal whereof is payable in the City of New York, in 1909, at the fiscal office of the Company in said city, is doing business within the State of New York, so as to be amenable to service of process within said state.

2. The court erred in holding that the defendant by reason of its issuing bonds, the principal whereof was payable in the City of New York in 1909 at the fiscal office of the Company in said City,
85 should be conclusively presumed to have maintained said fiscal office in the City of New York until said bonds were paid, and thereby rendered itself amenable to service of process within the State of New York, made by leaving the same with a vice-president of the Company, residing within the State of New York but not representing the defendant within the State of New York in respect to any business conducted in said state, even though the Company, at the time the action was brought, maintained no office in the State of New York, owned no property in New York State, transacted no business in said state and was not represented in said state by any person, firm or corporation.

3. The Court erred in denying the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant.

4. The Court erred in denying the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant when said motion was renewed at the opening of the trial, on the ground that the defendants had filed an answer on the merits, even though said answer set up as a defense the lack of the Court's jurisdiction over the person of the defendant.

5. The Court erred in entering a judgment against the defendant which, if enforced against the defendant in accordance with its terms, would, by reason of the absence of personal jurisdiction over the defendant, constitute a taking of its property without due process of law.

Dated, New York, July 1st, 1915.

FRUEAUFF & ROBINSON,
Attorneys for Defendant.

Office and P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

86 [Endorsed:] L. 13–100. In the District Court of the United States for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Assignment of Errors. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court S. D. of N. Y., July 2, 1915.

87 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs Respondents,

against

TOLEDO RAILWAY & LIGHT COMPANY, Toledo, Ohio, Defendant-Appellant.

Bond on Writ of Error.

Know all men by these presents, That Toledo Railway & Light Company of Toledo, Ohio, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, in the sum of Thirty-eight thousand, five hundred ($38,500) Dollars to be paid to the said Walter L. Hill and Ralph L. Spotts, as executors of the Last Will and Testament of Harford B. Kirk, deceased, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, ad-

ministrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 1st day of July, 1915.

Whereas, the above named Toledo Railway & Light Company of Toledo Ohio, has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York.

Now, Therefore, the condition of this obligation is such, that if the above named Toledo Railway & Light Company of Toledo, Ohio, shall prosecute its writ of error to effect, and answer all damages and costs if it fails to make said writ good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

TOLEDO RAILWAY & LIGHT CO.,
By FRANK W. FRUEAUFF, *Vice-Pres't.*
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
[CORPORATE SEAL.] *Resident Vice-President.*

Attest:
[CORPORATE SEAL.] E. M. McCARTHY,
Resident Assistant Secretary.

88 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of July, 1915, before me personally came William A. Thompson, known to me to be the resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Toledo Railway & Light Company as surtey and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Toledo Railway & Light Company is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and

liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of three million, five hundred thousand ($3,500,000) dollars.

WM. A. THOMPSON.
(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 1st day of July, 1915.

[NOTARIAL SEAL.] H. E. EMMETT,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of July, 1915, before me personally came Frank W. Frueauff; to me known, who, being by me duly sworn, did depose and say that he resides in Garden City, N. Y.; that he is the Vice-President of The Toledo Rys. & Lt. Co., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order

[NOTARIAL SEAL.] THOMAS H. FAIR.
Notary Public.

[Endorsed:] District Court of United States Southern District of New York Walter L. Hill and Ralph L. Spotts as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Plaintiffs-Respondents, against Toledo Railway & Light Company, Toledo, Ohio, Defendant-Appellant. Bond on Appeal. Surety National Surety Company, Frueauff & Robinson, 60 Wall Street, Attorney for Defendant-Appellant. I approve of the *written* Bond, and of the sufficiency of the surety thereon. Wm. I. Grubb, District Judge.

89 *Stipulation under Rule 8 of the Supreme Court.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed, by and between Kendall & Herzog, attorneys for the plaintiffs herein, and Frueauff & Robinson, attorneys for defendant herein, that the complete record in this ac-

tion on appeal to the honorable Supreme Court of the United States, for the purpose of determining the jurisdiction of the District Court of the United States in this action over the person of the defendant, shall consist of the following papers:

1. Summons and complaint.
2. Petition, order and bond on removal.
3. Order to show cause why service of summons should not be denied and set aside, together with one affidavit by Frank R. Coates, two affidavits by Frank W. Frueauff, one affidavit by Robert Burns, in support of said motion, and two affidavits by Paul M. Herzog in opposition to said motion.
4. Opinion of Judge Charles M. Hough relative to said motion.
5. Order denying said motion.
6. Answer of defendant.
7. Clerk's extracts of minutes and exhibits.
8. Judgment.

KENDALL & HERZOG,
Attorneys for Plaintiffs.
FRUEAUFF & ROBINSON,
Attorneys for Defendants.

90 [Endorsed:] United States District Court, Southern District of New York. Walter L. Hill & ano., Pl'ff- v. The Toledo R'ways & Light Co., Def'ts. Stipulation. Filed Jul- 7 , 1915. U. S. District Court, S. D. of N. Y.

91 *Citation.*

By the Honorable William I. Grubb, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at Washington, D. C., on the 29th day of July, 1915, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, wherein The Toledo Railways & Light Company is plaintiff-in-error and you are defendants-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above mentioned, this 1st day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the independence of the United States, the one hundred and thirty-ninth.

W. I. GRUBB,
Judge of the District Court of the United States, for the Southern District of New York, in the Second Circuit.

92 [Endorsed:] L. 13-100. United States Supreme Court. The Toledo Railways & Light Company, Plaintiff in Error (Defendant below), against Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Defendants in error (plaintiffs below). (Copy.) Citation. Frueauff & Robinson, Attorneys for Plaintiff in Error. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court, S. D. of N. Y., July 14, 1915. Service of a copy of the within Citation is hereby admitted this 13th day of July, 1915. Kendall & Herzog, Attorneys for Defendants in Error.

93 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
vs.
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Stipulation as to Correctness of Record.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated July 10, 1915.

KENDALL & HERZOG,
Attorneys for Plaintiffs.
FRUEAUFF & ROBINSON,
Attorneys for Defendant.

94 [Endorsed:] L. 13-100. United States District Court, Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors, etc., Plaintiffs, vs. The Toledo Railways & Light Company, Defendants. Stipulation as to Correctness of Appeal Record. Frueauff & Robinson, Attorneys for defendant, 60 Wall Street, Borough of Manhattan, City of New York.

95 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

WALTER L. HILL and RALPH L. SPOTTS, as Executors, etc.,
vs.
THE TOLEDO RAILWAYS & LIGHT COMPANY.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the

record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 20th day of July in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the said United States the one hundred and fortieth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

[10-cent U. S. revenue stamp—cancelled. A. G., Jr.]

96 [Endorsed:] Supreme Court of the United States. L. 13 100. The Toledo Railways & Light Company, Plaintiff in error, against Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Defendants in error. In error to the District Court of the United States for the Southern District of New York. Transcript of Record. Frueauff & Robinson, Counsellors-at-Law, 60 Wall Street, New York, Attorneys for Plaintiff-in-Error.

Endorsed on cover: File No. 24,853. S. New York, D. C. U. S. Term No. 570. The Toledo Railways & Light Company, plaintiff in error, vs. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased. Filed July 24th, 1915. File No. 24,853.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 700.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

vs.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AMEND RECORD.

KENDALL & HERZOG,
Attorneys for Defendant-in-Error,
HOWARD S. GANS, *of Counsel,*
Office & Post Office Address,
No. 293 Broadway,
Borough of Manhattan,
City of New York.

The Hecla Press, 57 Warren St., N. Y. Tel. [illegible] Barclay.

Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

Now come the defendants-in-error and move the court for an order directing that the affidavits of Alexander Reissman, verified February 27th, 1917, and of Paul M. Herzog, verified February 27th, 1917, and the recital of the occurrences upon the said trial appearing in the said affidavits, be annexed to and made a part of the transcript of the record herein with the same force and effect as though they had been set forth in and annexed to the certificate of jurisdiction appearing on the thirty-sixth page thereof as setting forth the facts upon which the said certificate was based, and had been made a part of the record as originally certified; and for such other relief in the premises as the court may deem just.

Dated, New York, February 27th, 1917.

Attorneys for Defendants-in-Error,
Of Counsel,
Office & Post Office Address,
233 Broadway,
Borough of Manhattan,
City of New York.

Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

2

PLEASE TAKE NOTICE that upon the annexed affidavits of Alexander Reissman, verified February [illegible], 1917, and Paul M. Herzog, verified February [illegible], 1917, the undersigned will move this Court at the opening of the session thereof, to be held at the Capitol in the City of Washington on the 6th day of March, 1917, or as soon thereafter as counsel can be heard, for an order directing that the said affidavits and the recital of the occurrences upon the said trial appearing in the said affidavits be annexed to and made a part of the transcript of record herein with the same force and effect as though they had been set forth in and annexed to the certificate of jurisdiction appearing on the 36th page thereof as setting forth the facts upon which

3

4 the said certificate was based and had been made a part of the record as originally certified, and that they will further move for such relief in the premises as to the Court may seem just.

Dated, New York, February 2 ~~1~~, 1917.

KENDALL & HERZOG,
Attorneys for Defendants-in-Error,
HOWARD S. GANS, of Counsel,
Office & Post Office Address,
233 Broadway,
Borough of Manhattan,
City of New York.

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6

SUPREME COURT 7

OF THE UNITED STATES.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error. 8

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ALEXANDER REISSMAN, being duly sworn, says that he is one of the stenographers designated by the District Court of the United States for the Southern District of New York.

That he was present at the trial of the above-named cause on the 18th day of June, 1915, from the beginning of the said trial to the end thereof, and took the stenographic minutes thereof. That he recorded in the said minutes everything that was said upon the said trial by the Court and the several counsel and witnesses.

That the counsel for the defendant, The Toledo Railways & Light Company, participated in the said trial by making the statements appearing after his name in the transcription from the minutes herein- 9

10 below set forth, and to that extent and that extent only, and that he made no statements other than those hereinafter set forth. That the statements and rulings of the Hon. William I. Grubb appearing after his name in the said transcription of the minutes were made by him in response to the said statements of the defendant's counsel, without any statements on behalf of the counsel for the plaintiffs in said action.

That the following is a true transcript of my stenographic minutes of said statements and occurrences:

That immediately after the impaneling and swearing of the jury, Mr. Robinson, the counsel for
11 the defendant (plaintiff-in-error), addressed the Court as follows:

> "Mr. Robinson: If your Honor please, the defendant appears specially and has heretofore moved this Court for an order to deny and quash the service of the summons and complaint and to dismiss this action upon the ground that the defendant is a foreign corporation organized under the Laws of the State of Ohio, has no office in the State of New York, has no property in the State of New York, and does no business in the State of New York, and is not amenable to the process of the court of this jurisdiction.
>
> 12 This motion, if the Court please, was brought on before Judge Hough on the affidavits of Frank W. Frueauff, Frank R. Coates and Robert Burns, all verified September 11th, 1914, and was opposed by the affidavit of Paul M. Herzog, verified October 2nd, 1914. Judge Hough denied the motion, and in his opinion it appears from the last paragraph, and I quote

from his opinion, 'The motion to set aside the 13
service is denied and an order embodying such denial and fixing a time for answer has been entered by me,' and in conformity with that opinion the Judge entered his own order. For that reason, if the Court please, the defendant asks to have this exception to the ruling of Judge Hough upon that application noted upon the record at this time because this is the first opportunity that the defendant has had to present its exception to that order. Therefore, if the Court please, the defendant now renews its motion to quash the service of the summons and complaint."

That thereupon the following colloquy took place 14
between the said counsel and the Court, and the Court made the ruling therein set forth:

"The Court: But you filed an answer, did you not?

Mr. Robinson: We were compelled to file an answer.

The Court: But, as I understand it, you cannot move the Court to quash the service after you have filed an answer.

Mr. Robinson: We set that up as a defense. I understand that is the practice in this District and we are following the record that has gone to the United States Supreme Court. I don't know that your Honor is bound by the de- 15
cision of Judge Hough, but under the practice here there is no other way.

The Court: You have already moved to quash the service of the summons and complaint, then you have filed an answer, and it seems to me it is too late again to move the Court to quash the service. In other words, as I under-

16 stand it, this is a motion made to quash the service after the appearance in a case and a general answer.

Mr. Robinson: Well, as long as your Honor will deny the motion anyway——

The Court: I am not passing on the correctness of the original ruling, but it seems to me that when you make a motion to quash the service after filing an answer it is too late; therefore, I will overrule your motion.

Mr. Robinson: And the defendant excepts.

The Court: Of course, as to the exception to Judge Hough's motion, I have nothing to do with that.

17 Mr. Robinson: And your Honor will allow me an exception?

The Court: Yes.

Mr. Robinson: Now, I would like to place the motion more formally upon the record than I have done.

The Court: I will overrule the motion to quash the service because it is too late.

Mr. Robinson: The defendant moves to quash the service of the summons and complaint herein and to dismiss this action on the ground that the attempted service of the summons and complaint herein on the defendant corporation, by delivering a copy of the same to Frank W. Frueauff, an officer thereof, in the

18 City, County and State of New York, was not sufficient to confer on this Court jurisdiction over the person of the defendant and was not due service on the said defendant corporation inasmuch as the said defendant corporation was organized under the Laws of the State of Ohio, maintains no office in New York State, does no business and owns no property therein,

and did not at the time of the service of said 19
summons.

This motion, if the Court please, is made on the affidavits heretofore filed, upon which the order of Judge Hough was made and entered herein, dated October 7th, 1914, and the defendant respectfully excepts to your Honor's ruling.

The Court: I overrule the motion, and you may have an exception, on the ground that it comes too late and there having been an answer filed on the merits.

Mr. Robinson: And the defendant will take no part in this trial other than to present the proper motions on the question of jurisdiction." 20

That thereupon the counsel for the plaintiffs (defendants-in-error) proceeded to introduce evidence on their behalf, and that upon his offer in evidence of the bonds in suit counsel for the defendant (plaintiff-in-error) made the following objection, and the Court made the following ruling thereon:

"Mr. Robinson: The defendant would like to have noted on the record that it makes the motion to quash and dismiss heretofore made on the papers heretofore referred to and for the reasons heretofore stated, and objects to the Court proceeding with this trial or the examination of any witnesses, or of the introduction 21
of any evidence or the reception of any testimony, and your Honor grants me an exception?

The Court: I overrule the motion and an exception is granted.

(Marked Plaintiff's Exhibit No. 2.)"

22 That thereafter, and upon the close of the case of the plaintiffs (defendants-in-error), counsel for the defendant (plaintiff-in-error) made the following motion, and the Court ruled thereon as follows:

"Mr. Robinson: If your Honor please, the defendant moves to dismiss the complaint on the grounds heretofore stated and renews its motion to quash the service of the summons and complaint and to dismiss this cause upon the papers before Judge Hough upon which the order of October 7th, 1914, was entered, and on the grounds set forth in the notice of motion upon which that order was entered.

The Court: I overrule that motion.

23 Mr. Robinson: And the defendant excepts.

Mr. Herzog: I ask your Honor to direct a verdict.

Mr. Robinson: And may I note the same objection and an exception to the direction of a verdict and to be allowed the same exception?

The Court: Yes."

That thereafter, and after the direction of the verdict by the Court, the counsel for the defendant (plaintiff-in-error) moved the Court, and the Court ruled in the following terms:

"Mr. Robinson: If your Honor please, the
24 defendant excepts to the verdict of the jury on the ground that the Court has no jurisdiction on the person of the defendant and moves to quash the service of the summons and complaint and to dismiss this action upon the ground that the attempted service of the summons and complaint herein on the defendant corporation, by delivering a copy of the same

to Frank W. Frueauff, an officer thereof, in the City, County and State thereof, was not sufficient to confer on this Court jurisdiction over the person of the defendant, was not due service on the said defendant corporation, inasmuch as said defendant corporation was organized under the Laws of the State of Ohio, maintains no office in New York State, does no business and owns no property therein, and did not at the time of the service of said summons. 25

The Court: Overruled.

Mr. Robinson: And to this motion the defendant excepts and states that this motion is made on the papers which were before Judge Hough at the time of the entry of the order of October 7th, 1914, and your Honor will allow us the usual time to prepare an appeal on the question of jurisdiction to the United States Supreme Court. Your Honor will give us the usual stay of execution? 26

The Court: I will give you the usual ten days' stay, but I think you will have to file a supersedeas.

CASE CLOSED."

ALEXANDER REISSMAN.

Sworn to before me this
27th day of February, 1917.

WALTER J. GRAHAM, 27
Notary Public,
(Seal) New York County.
New York Co. Clerk's No. 293.
New York Co. Reg. No. 7218
Bronx Co. Clerk's No. 12.
Bronx Co. Reg. No. 725.
Kings Co. Clerk's No. 13.
Kings Co. Reg. No. 7087.

28 SUPREME COURT

OF THE UNITED STATES.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
29 Defendants-in-Error.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

PAUL M. HERZOG, being duly sworn, deposes and says, I am an attorney and counsellor-at-law and a member of the bar of the District Court for the Southern District of New York and of this Court. I was present at the trial of the above-entitled cause in the District Court for the Southern District of New York on behalf of the plaintiffs. I have read the annexed affidavit of Alexander Reissman, and the matters therein set forth accord with
30 my recollection of the occurrences at said trial.

I am advised that to enable this Court to do full and exact justice herein it may be necessary that it be advised of the precise character of the occurrence upon the trial and of the manner in which the questions sought to be presented to this Court by the writ of error herein were sought to be raised

in the Court below, and of the manner in which and 31
the extent to which the matters certified by said Court were presented to it. To that end I have caused this motion to be made to add to the transcript of the record herein the stenographic record of the motions made by the plaintiff-in-error upon the trial of this action and the rulings thereon by the Court. All of the said rulings were made by the Court as appears by the said stenographic record *sua sponte* and without any argument or intervention upon my part.

No previous application for the relief herein prayed for has been made to any Court or Justice.

PAUL M. HERZOG.

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Sworn to before me this
27th day of February, 1917.

WALTER J. GRAHAM,
Notary Public,
(Seal) New York County.
New York Co. Clerk's No. 293.
New York Co. Reg. No. 7213.
Bronx Co. Clerk's No. 12.
Bronx Co. Reg. No. 725.
Kings Co. Clerk's No. 13.
Kings Co. Reg. No. 7087.

33

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 366.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff in Error,

vs.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM IN SUPPORT OF MOTION TO AMEND RECORD.

KENDALL & HERZOG,
Attorneys for Defendant-in-Error,
HOWARD S. GANS, *of Counsel,*
Office & Post Office Address,
No. 233 Broadway,
Borough of Manhattan,
City of New York.

The Heide Press, 67 Wall St., N. Y. Tel. 6361 Barclay.

Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT COMPANY, Plaintiff-in-Error, against WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Defendants-in-Error.	No. 200.

MEMORANDUM IN SUPPORT OF THE MOTION TO ADD TO THE RECORD.

This cause comes before this Court on a writ of error to review a judgment entered in the District Court for the Southern District of New York, in favor of plaintiffs, who are residents and citizens of the State, against a foreign corporation. The writ of error issues out of this court direct to the District Court, by reason of a certificate of the Trial Judge to the effect that a question of jurisdiction of the court was at issue (Record, p. 35).

The question of jurisdiction was sought to be raised by a motion to quash the service of the summons and complaint made prior to the interposition of an answer in the case, by an attempt to

renew the motion on the trial and by a plea to the jurisdiction contained in the answer.

The record as transmitted to this court discloses the moving papers upon which the motion to quash the service was made prior to the interposition of the answer, and discloses nothing with respect to that which took place on the trial save as it appears by the certificate of the Trial Judge.

In *Mechanical Appliance Co.* v. *Castleman* (215 U. S., 437, 445), under somewhat similar circumstances this Court held that certain affidavits were to be regarded as evidence submitted in support of a plea to the jurisdiction, by reason of the fact that they were printed in the record, that it did not appear by the bill of exceptions that any objection had been made to the filing of the affidavits, and that it did appear that the plaintiff in the court below had also filed an affidavit.

The purpose of this motion is to annex to the record a verified transcript of the stenographer's minutes, from which it appears that in this case the affidavits in question were not offered in support of the plea to the jurisdiction, that the plaintiffs in the court below in no manner acquiesced in their offer for such purpose in substitution for common law proof, and that the plaintiffs did not offer the affidavits which are filed in the record, as proof under the issues raised by the plea.

It is deemed important that this should appear of record, to the end that there be no misapprehension as to the course actually pursued upon the trial, and to the end that this Court may not be misled by the record into a conception that the

affidavits in question were offered as evidence in support of the plea to the jurisdiction.

Dated, New York, March 5, 1917.

Respectfully submitted,

KENDALL & HERZOG,
Attorneys for Defendants-in-Error,
HOWARD S. GANS, of Counsel,
Office and Post Office Adrdess:
233 Broadway,
Borough of Manhattan,
City of New York.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 200.

THE TOLEDO RAILWAYS AND LIGHT COMPANY,
Plaintiff-in-Error,

v.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

Memorandum on Behalf of Plaintiff-in-Error, in Opposition to Motion to Amend Record.

The plaintiff-in-error respectfully opposes the motion to advance made on behalf of the defendants-in-error for the following reasons:

The matter which the defendants-in-error seek to have placed in the record of this case purporting to be a transcript of the stenographer's minutes taken at the trial of the action, is quite irrelevant and immaterial to the decision of this appeal. On

appeals of this class (that is, those involving only a jurisdictional question) the papers to which this Court looks as to the nature of the question presented are the certificate as to question of jurisdiction, signed by the District Judge, together with the Clerk's extract from the minutes, and of these the latter is of minor importance. The plaintiff-in-error in this case in making up the record which was approved by defendants-in-error through stipulation, carefully followed the record on appeal in two cases of this class which had already come up before the Supreme Court. They are:

Wabash Western Ry. Co. v. Brow, 164 U. S., 271.

St. Louis S. W. R. Co. v. Alexander, 227 U. S., 218.

The plaintiff-in-error submits, therefore, that the record as made up in this case contains all the relevant and material papers and conforms strictly to the established practice.

The plaintiff-in-error submits that this attempt to amend the record is, in effect, an attempt to amend the certificate as to question of jurisdiction which has already been signed in this action by Hon. W. I. Grubb, D. J. In that certificate the learned Justice of the Court below certifies the precise question in issue to this Court with whatever facts are necessary to enable this Court to reach its determination. Any attempt to annex to this certificate as a part thereof a transcript containing the record of colloquy between Court and counsel is obviously an attempt to alter or amend the certificate of the learned Judge below which has been filed in this case and has become a part of the record. This motion is, therefore, we submit, quite

irregular and improper. Any alteration or amendment of the certificate should be made by the learned Judge below himself, upon whose certificate this Court is proceeding. Said certificate, which is contained in the record at folios 75 to 79, inclusive, is quite accurate and complete, and sets forth all of the relevant facts upon this appeal, as well as a concise statement of the issue in law involved, and in it will be found everything essential for the determination of this appeal.

Furthermore, the matter contained in the affidavit of Alexander Reissman, who was the Court stenographer and whose affidavit is made the basis of this motion, appears to contain not only what purports to be colloquy between Court and counsel at the time the case was called for trial and which is set forth in quotation marks in his affidavit, but also certain statements as to what took place before and during the progress of the trial, which we submit is not properly part of the stenographer's minutes. Even if it should be granted, therefore, that it was proper, or at least not objectionable, to insert some new matters in this record, nevertheless, we submit that this Court can not properly determine just what portion of the language set up in the affidavit of Alexander Reissman should be included as the proper stenographic minutes of this case, but that the record would have to go back to the Clerk of the United States District Court for the Southern District of New York in order that he may make proper certificate in respect thereof.

For the reasons above set forth, we respectfully submit that this motion should be denied.

Respectfully submitted,

CHARLES A. FRUEAUFF,
Solicitor for Plaintiff-in-Error.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 200

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

vs.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased.

Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE AND BRIEF ON BEHALF OF DEFENDANTS-IN-ERROR.

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

PAUL M. HERZOG,
ARTHUR S. LEVY.

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IN THE

Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

vs.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

AND NOW, this fifth day of June, 1916, come the defendants-in-error, by their counsel, and move the Court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below.

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

SOUTHERN DISTRICT OF NEW YORK, ss.:

ARTHUR S. LEVY, being duly sworn according to law, deposes and says: That on the 12th day of May, 1916, he served a notice in the form attached hereto as Exhibit A and five copies of this brief upon Messrs. Frueauff & Robinson, counsel for the plaintiff-in-error, at the office of said counsel, No. 60 Wall Street, New York City, N. Y., by delivering said notice and copies of brief to the person in charge of the office of said counsel and leaving the same with him.

ARTHUR S. LEVY.

Sworn to and subscribed before me this 12th day of May, 1916.

WALTER J. GRAHAM,
Notary Public,
(SEAL) New York County.
New York Co. Clerk's No. 293.
New York Co. Reg. No. 7213.
Bronx Co. Clerk's No. 12.
Bronx Reg. No. 725.
Kings Co. Clerk's No. 13.
Kings Co. Reg. No. 7687.

Exhibit A.

Messrs. Frueauff & Robinson,
60 Wall Street, New York City.

PLEASE TAKE NOTICE that on Monday, June 5th, 1916, I will present to the Supreme Court of the United States, in the matter of Toledo Railways & Light Co., Plaintiff-in-Error, vs. Walter L. Hill and Ralph L. Spotts, as Executors of Harford B. Kirk, deceased, Defendants-in-Error, the motion of which the enclosed is a copy. I also hand you herewith five copies of the brief which will be presented with the motion.

Dated, New York, May 12th, 1916.

Yours, etc.,

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

STATEMENT OF THE CASE.

This case is before the Court on writ of error direct from the District Court for the Southern District of New York, upon the sole question of the jurisdiction of the District Court. The action was commenced in the Supreme Court of the State of New York, by the service of the summons and complaint in said State on one Frank W. Frueauff, a resident of said State and one of the directors and vice-president of the defendant corporation. The defendant is an Ohio corporation. The plaintiffs are executors of Harford B. Kirk, deceased, late a resident of the State of New York. Walter L. Hill, one of the plaintiff-executors, was at the commencement of the action a resident of Massachusetts. Ralph L. Spotts, the other plaintiff-executor, is a resident of New York. Since the commencement of the action Walter L. Hill has died, but by consent the action is prosecuted under its original title.

The action is brought to recover upon twenty-five coupon bonds issued by the defendant, and being part of a series of 12,000 bonds all of like tenor, amount, date and effect, each in the sum of $1,000, payable on the 1st day of July, 1909, at the fiscal office of the defendant in the City of New York. Three unpaid coupons in the usual form in the sum of $20 each are attached to each bond, also expressed to be payable at the fiscal office of the defendant in the City of New York. One of said bonds and coupons is printed in the record at pages 22 *et seq.*

After the commencement of the action it was, upon petition of the defendant, removed to the District Court of the United States for the Southern District of New York, upon the ground of diversity

of citizenship. Thereafter the defendant made a motion in the said District Court to vacate the service of the summons on the ground that the defendant was not doing business in the State of New York. Affidavits on behalf of both sides were submitted on this motion, and the motion was denied. No appeal was taken from the order denying the motion, but the defendant answered both to the merits and the jurisdiction. The case thereafter came on to be tried. The defendant presented no proof and contented itself with renewing its motion to vacate the service. The Trial Court, after taking the plaintiffs' proof of the allegations of the complaint, directed a verdict for the plaintiffs. The case comes up on writ of error and the certificate of the District Judge that the sole question involved is the jurisdiction of the Court below.

I.

The service of the summons was valid and effectual to give the Court jurisdiction.

There is no dispute that the summons was served June 29th, 1914, on one Frank W. Frueauff in the State of New York and Southern District of New York; that said Frueauff then was and had been since April, 1913, a director of the defendant company, and then was and had been since January, 1914, its vice-president; that said Frueauff then was a permanent resident of the State of New York, and of the Southern District of New York. One of the plaintiffs is a resident of New York and the contract was made in New York to be performed in New York. The service was, therefore, perfect under the State Law.

N. Y. Code of Civil Procedure, Sec. 432.

After removal to the Federal Court, the defendant made its motion to quash the service, relying on the rule in that Court that the defendant must do business in the jurisdiction. We concede that such is the rule, and the only question under this point is whether the defendant is doing business in New York, or is precluded from asserting that it is not so doing business, which matters we proceed to consider separately in inverse order.

A.

The motion to vacate the service came on to be heard before District Judge HOUGH, who denied it, as appears from his opinion (fols. 52-53-54), on the ground that the defendant had agreed in its contract to maintain a fiscal office in the State of New York, and thereby to engage in business in that State, at any rate for the purposes of this contract; that it could not be heard to say that by refusing to keep its obligation it had ousted the Court of jurisdiction. We believe that under the reasoning of *Lumbermans Ins. Co.* v. *Meyer*, 197 U. S., 407, relied on by the District Judge, and to which we will presently advert at more length, this decision is sound, but the plaintiffs' case is by no means dependent upon it. The record discloses and there is no doubt in our mind that the defendant is actually doing business in New York in a very substantial way. This latter question, however, will be discussed under our head B of this point.

In *Lumbermans Ins. Co.* v. *Meyer*, *supra*, a service upon a New York director of a Pennsylvania company was held good on the ground that the policy clearly implied that the company was in the case of loss to do business in New York, by sending its agent there to adjust the loss. In the case at

bar the contract contemplates that the defendant will maintain a fiscal office in the City of New York, for by their terms the bonds are payable at such fiscal office. As the District Judge points out, the Lumbermans Ins. Co. having obviously not adjusted the loss, had not done what its contract implied, but the Court did not for that reason relieve it of the obligation it had assumed and upon which the plaintiff was entitled to rely.

The following quotations from the *Lumbermans Ins. Co.* case will show how closely the reasoning there may be paralleled in the present case, except that here the maintenance of a fiscal office is even more positively the doing of business than the sending of an agent:

> "The provisions of the policy clearly contemplate the presence of an agent of the company at the place of the loss after it has occurred."
>
> "As the policy insures against loss, it of course contemplates that such loss may occur, and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated." (As the bond in the instant case was for an absolute payment, the arrival of its due date was certain to occur.)
>
> "It (the company) is doing (in adjusting the loss) the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; *and it does it in furtherance of the contract and in order to carry out its provisions, and it could not properly be carried out without this act being done.*" (Italics ours.)
>
> "This is not a sporadic case, nor the contracts in suit the only ones of their kind issued."

Every word of this might have been written in the case at bar. If these considerations are not perfectly nugatory, they mean that the defendant will not be heard to deny that it has done what it agreed to do, what the contract contemplated that it should do and without the doing of which the contract could not be performed.

The doctrine of *Lumbermans Ins. Co.* v. *Meyer* has been followed and even extended by this Court in *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S., 245, a case in which the company merely reserved to itself the right to send a representative, etc.

If the test is to be the contemplation of the contract, there can be no question but that the District Judge was right, and that the defendant in the case at bar cannot be heard to advance what he terms the "dishonest argument" that by refusing to carry out its contract it has ceased to do business in New York.

B.

The defendant is actually engaged in business in New York, more than sufficiently to bring it within the jurisdiction. There is no hard and fast rule as to what constitutes doing business to the extent required to permit of service in a given jurisdiction, but each case must be decided on the particular facts disclosed.

> *St. Louis S. W. Ry. Co.* v. *Alexander*, 227 U. S., at page 227.

The affidavits submitted by the defendant are replete with unqualified statements to the effect that the defendant does not do and never did any

business in New York. These statements when looked at in the light of the actual facts would appear to be, to say the least, disingenuous. The bonds are expressed to be payable principal and interest at the fiscal office of the company in the City of New York, and interest was admittedly paid thereon in said city for a number of years. We cannot comprehend how, at least for the period that such fiscal office was maintained, it can be denied that the defendant was doing business in New York. Mr. Frueauff denies it (first sentence of paragraph Sixth of his affidavit, fol. 38). A careful scrutiny of his affidavit discloses that the only basis for this denial is the fact (1) that the company did not apparently pay rent and put its name on the door, but constituted a New York banking house its fiscal agent, and (2) that the payments were made in New York for the convenience of the bondholders (fols. 38, 39). The cogency of this latter fact may be clear to one who styles himself a "public service financier and expert." To counsel for the plaintiffs it is the fact that the company maintained a fiscal office in New York and not its motive in doing so that is controlling. It should also be noted that the president of the defendant company frankly admits that the defendant had an office and assets in New York prior to 1909 (fol. 23), although in the same breath denying that even then it was doing business in that State.

Mr. Frueauff also denies that the defendant company is now doing business in New York or that he represents it there. The basis of this denial seems to be that, although Mr. Frueauff is vice-president of the defendant, he manages its properties in the capacity of vice-president of another

corporation called the Cities Service Company, one of the defendant's principal stockholders. We submit that one who is an officer of a holding company and also of its subsidiary company cannot escape responsibility by swearing that he is acting for the holding company only.

Mr. Frueauff denies (fol. 38) that he performs any "executive" duties for the defendant, and denies that he or any other member of the firm of Henry L. Doherty & Co. is "actively" engaged in the "executive" management of the defendant (fol. 38), and adds that the members of the said firm of Henry L. Doherty & Co., of which he is one, are from time to time consulted as public service experts on financial, engineering and other problems (fol. 37). We do not know what Mr. Frueauff considers "executive" duties. We do know that it affirmatively appears (fol. 42) that Mr. Frueauff's firm entered into a contract still unexpired to direct the management of the Toledo properties, and for this contract and certain underwriting, received several million dollars in stock. We quote from the circular issued to bondholders and incorporated in the papers on appeal (fol. 42). This circular was issued in connection with the same "reorganization" to which frequent reference is made in the defendant's answer (paragraphs Sixth and Seventh of the Answer, fols. 60, 61, 62):

> "*We* (Henry L. Doherty & Co.) *are to receive 25% of the Common Stock for agreeing to direct the management of the Company for a period of five years and for underwriting* * * *.
>
> "*The Common Stock is to be placed in a voting trust which will contract with us for the management of the property.*" (Italics ours.)

This from the very firm of Henry L. Doherty & Co. of which the Mr. Frueauff who now swears he has no part in the management of the company is a member. Or perhaps Mr. Frueauff of the many capacities considers that when he performs his duties under this contract he sheds his coat as vice-president of the defendant and becomes for the nonce solely a member of his private firm. In their brief below counsel for the defendant suggested the impossibility of managing a Toledo property from New York. More surprising things than this are done in the realm of railway finance, and in any case the fact remains that Mr. Frueauff contracted to do it, has been paid for doing it, and it becomes him very ill to assert that he pocketed the reward for doing what he always knew to be impossible.

Moreover, suppose he be taken at his word, and it be admitted that he performs no "executive" duties. We are not aware that it is by "executive" duties alone that an officer must represent his corporation. The financing of a street railway is not the least important of its activities, and if an officer is engaged in marketing securities or otherwise providing for the financial needs of his company, he is as genuinely representing it as if he acted for it in any other capacity. Mr. Frueauff admits that "as a member of Henry L. Doherty & Co." he assists the defendant relative to financial, engineering and other problems. Again we deny the gentleman the privilege of changing his capacity by the operation of his mind for the purpose of this suit. We submit that he *is* the vice-president of the defendant, and that when the defendant requires his service, advice or assistance he cannot then resolve himself into a member of the firm of Henry L. Doherty & Co., for the purpose

of maintaining that he never represented the defendant and so oust the Court of jurisdiction.

Moreover, if, as we believe, the company is doing business in the State of New York, and is managed from New York, it matters little whether Mr. Frueauff, who was served, does or does not do any particular act representing the defendant. We quote the following from *Lumbermans Ins. Co.* v. *Meyer*, 197 U. S., 407, as being peculiarly pertinent to this question, the situation as to a public service corporation which markets its securities in New York being much the same as that of the insurance company with respect to the confidence inspired by resident directors and officers:

> "A foreign fire insurance company doing business within another state, and voluntarily electing a part of its directors from among those who are residents of such state, may be said by that very fact to add to the confidence of possible insurers with the company in that state, and in that way to secure more business therein than would otherwise be the case. *Although doing no particular act in the state for this company*, such directors are, nevertheless, * * * a part of the governing body of the company * * *." (Italics ours.)

We desire further to call the attention of the Court to the fact that, (1) as appears from the answer of the defendant (fol. 59), the title to all of the "real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of the defendant, including all property and rights thereafter to be acquired by it or consolidated with it," is in the United States Mortgage & Trust Company of the City of New York, having been conveyed to it by a certain deed of

trust, to which the defendant's answer specifically refers. (2) The bonds are expressed to be invalid until authenticated by the certificate of the trustee, a New York corporation, and the bonds in suit are so authenticated (fol. 72). (3) The bonds were sold to the plaintiffs' testator in New York (fol. 32) and were printed in New York by the American Bank Note Company. We may therefore summarize the situation as showing that the defendant caused to be printed in New York and offered for sale in New York its bonds, its obligation under which was to be performed wholly in New York at the fiscal office of the company in New York, which bonds were purchased in New York by a resident of New York; that thereafter, in pursuance of its contract, and for some time after the due date of the bonds, the defendant maintained its office and kept property within New York; that at the commencement of the suit the defendant maintained officers and directors resident in New York; that these officers are the individual members of a New York firm which is managing the properties of the defendant under contract; that these officers by their own admission are consulted and advise the company upon financial, engineering and other matters, and that the legal title to all of the company's property is in a New York trust company. We submit that the Court should look to the substance rather than to the technical form of the intricate inter-relations of these firms, individuals and corporations, and hold that the defendant is actually engaged in business in the State of New York.

II.

Assuming that the defendant is not in fact doing business in New York, no proof tending to show this fact was presented to the Trial Court, which was therefore bound to give judgment for the plaintiffs.

This is not an appeal from the order denying the motion to quash the service, but from the judgment at the trial, and the Trial Court could act only on the testimony before it. If, therefore, the proof as offered at the trial upon the disputed question of fact upon which jurisdiction rests (*i. e.*, was the defendant doing business in New York) afforded no basis upon which the Court could find for the defendant, the judgment must be affirmed. *The affidavits submitted upon the motion to quash were not before the Trial Court.* The defendants-in-error have consented that they be printed in the record so that the whole matter may be before this Court, should it deem this point not well taken, but the fact remains that these affidavits were not offered in evidence, and would not have been competent evidence if offered. The defendant should have offered testimony in support of its plea to the jurisdiction. It did not. It offered no testimony whatever upon any point. We believe, as we shall presently point out, that the burden of proof in the matter of the disputed jurisdictional question of fact was upon the defendant, but assuming it to be upon the plaintiffs, they sufficiently sustained the burden. By offering the bonds in evidence the plaintiffs established at least a *prima facie* case showing that the defendant maintained a fiscal office in the City of New York, the bonds

being expressed to be payable at such fiscal office. This certainly required the defendant to proceed to overcome the presumption, with proof that the defendant had abandoned such fiscal office, and had it done so, the plaintiffs could have offered their testimony showing the other facts pointed out in this brief upon which they rely to show the doing of business. However, the burden of proof upon the disputed jurisdictional fact was initially upon the defendant, and had the plaintiffs' case contained nothing whatever upon the point, the Trial Court would have been bound none the less to overrule the defendant's plea and direct judgment as it did. The question of the burden of proof in such cases is carefully discussed by this Court in *Chase* v. *Wetzlar*, 225 U. S., 79, in which the authorities are reviewed and the determination reached that where there exists a disputed question of fact going to the jurisdiction, the burden is upon the plaintiff where the objection addresses itself to the want of all foundation for judicial action, but otherwise where the objection is less fundamental in its nature and not of such a character as to strip the Court of power to make a binding decree. The question here involved is indubitably of the latter class. Whether the defendant is doing business in the State is not a question striking at the foundation of all judicial action in the matter. The action was unimpeachable in the State Court. There was present in the jurisdiction a resident officer of the defendant who was served, so that there was certainly not that entire lack of a person or property within the jurisdiction over which the authority of the Court could be exerted. The rule that the defendant must be doing business in the district is founded not on any inherent necessity that such shall be the case in order to give the Court control

of the person of the defendant, but rather upon the convenience of the defendant and the hardship that might often be worked by the contrary rule. The rule itself was long in doubt and the question involved is clearly of a class with the citizenship of parties, or the amount in dispute, in which class of cases, as stated in *Chase v. Wetzlar, supra*, the burden of offering testimony is upon the pleader who assails the jurisdiction.

III.

The defendant has appeared generally, thereby curing any defect in the service and submitting itself to the jurisdiction of the Court.

That a general appearance waives a lack of jurisdiction over the person of the defendant has long been well settled, and that it will work a waiver of the particular objection that the action is brought in the wrong district has been determined.

> *Noonan v. Delaware, L. & W. R. Co.*, 68 Fed., 1.

Especially where the service, as is the case here, was good in the State Court.

> *O'Donnell v. Atchison, T. & S. F. R. R. Co.*, 49 Fed., 689.

We claim two acts on the part of the defendant, either of which constitutes a general appearance.

A. *The defendant obtained extensions of time to plead.* Its time to answer the complaint expired July 19, 1914 (fol. 14 of record). Their an-

swer was served October 10, 1914 (fol. 64). The extension from September 12, 1914, to the date of service of the answer was by order of the District Judge extending their time to "plead herein or make such motion relative to the complaint as they may be advised" (fol. 20). (Intermediately the time was extended by stipulation of the attorneys, but this does not appear affirmatively in the record.)

This constitutes a general appearance.

Hupfeld v. *Automaton Piano Co.*, 66 Fed., 788.

Murphy v. *Herring-Hall-Marvin*, 184 Fed., 495.

B. *The defendant has answered on the merits.* The older cases are uniform in holding that by answering the defendant appears generally and cures a defect in the service.

Caskey v. *Chenoweth*, 62 Fed., 712.
Edgell v. *Felder*, 84 Fed., 69.

And that no words of reservation can make such an appearance a special one.

Crawford v. *Foster*, 84 Fed., 939.

We are aware that the opposite rule obtained in *Harkness* v. *Hyde*, 98 U. S., 476, and cases relying thereon, such as *Central Grain & Stock Exchange* v. *Board of Trade of Chicago*, 125 Fed., 463, but the doctrine of the *Harkness* case has been held inapplicable where the Court had jurisdiction of the subject-matter of the action and the process was served within the territorial jurisdiction of the Court.

Eddy v. *Lafayette*, 49 Fed., 807, judgment affirmed but without expressing opinion on this point, 163 U. S., 456.

The judgment should be affirmed.

Respectfully submitted,

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

PAUL M. HERZOG,
ARTHUR S. LEVY.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. [redacted] 200

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

Memorandum on Behalf of Plaintiff-in-Error on Motion to Advance.

CHARLES A. FRUEAUFF,
Solicitor for Plaintiff-in-Error.

APPEAL PRINTING COMPANY, NEW YORK.

IN THE

Supreme Court of the United States.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

In Error to the District Court of the United States for the Southern District of New York.

In respect of the motion of the defendants-in-error to advance the above entitled case for hearing, plaintiff-in-error would respectfully say that it has no objection to the cause being advanced, but that it desires to orally argue the appeal, and, therefore, by urging no objection to said advancement, does not wish to be deemed to consent that said appeal be submitted without oral argument but, on the contrary, wishes to insist upon its right to orally argue said appeal. Nor does the plaintiff-in-error wish to be understood, in not objecting to said advancement, to admit either the accuracy of the statements of fact or the soundness of the conclusions of law contained in the brief of the defendants-in-error filed on this motion to advance.

Respectfully submitted,
CHARLES A. FRUEAUFF,
Solicitor for Plaintiff-in-Error.

SUBJECT INDEX.

IN THE

Supreme Court of the United States.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

v.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Hartford B. Kirk, deceased,
Defendants-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement of the Case.

This is an action instituted by the defendants-in-error (the plaintiffs below) as executors of the Last Will and Testament of Hartford B. Kirk, late of the City, County and State of New York, deceased, for the recovery of $26,500, claimed to be due by virtue of the alleged ownership of certain alleged bonds of the plaintiff-in-error as set forth in the complaint (fols. 5-9).

The plaintiff-in-error is a corporation organized and existing under the laws of the State of Ohio, and is engaged in operating street railroads and electric properties in the City of Toledo in said State (fol. 22). That said incorporation, as stated in its articles of incorporation, is formed

for the purpose of constructing, maintaining, operating, extending, purchasing, acquiring, leasing and owning street railroads and railroads operated as street railroads, to be operated by electric power, together with all the property, real, personal and mixed, and all franchises, rights and privileges respecting the use and operation of the same and for purposes incidental thereto in the City of Toledo, Lucas County, Ohio, and of doing all matters and things proper to such business, including the manufacturing, procuring, providing, furnishing, conveying and distributing of all power, heat and light that is now, or may hereafter, be found to be proper, convenient or desirable in the carrying out of such purpose and incidental to such purpose, and to use, maintain and operate all electric light and power property, rights, privileges and franchises which said corporation may lease or purchase.

The defendants-in-error attempted to institute this suit in the Supreme Court of the State of New York, for the County of New York, and to serve a summons and a copy of a complaint in this action on the plaintiff-in-error, by delivering the same, on or about June 29th, 1914, to one Frank W. Frueauff, who is, and then was, a Vice-President and Director of the plaintiff-in-error, and who resided in Garden City, Long Island, New York (fol. 25).

Subsequently thereto, by petition duly filed, in which plaintiff-in-error appeared specially for the purpose of the petition solely (fols. 10-14), the case was removed to the District Court of the United States for the Southern District of New York (fol. 15).

After said removal plaintiff-in-error, still appearing specially, moved to vacate and set aside

the attempted service of process herein on the plaintiff-in-error on the ground that said service was insufficient and ineffectual to give the Court jurisdiction over the person of the plaintiff-in-error (fols. 19-49) for the reason that the plaintiff-in-error was a corporation foreign to New York State, that it transacted no business, maintained no office and owned no property in said State at the time of the attempted service of process. This motion was denied (fols. 55-56).

The plaintiff-in-error then served its answer to the complaint (fols. 58-65).

At the opening of the trial of the action, the plaintiff-in-error duly renewed its motion to quash service herein and to dismiss said action for want of personal jurisdiction, and said motion, as thus renewed, was denied upon the authority of the prior order and because made after answer on the merits (fols. 66, 76). Counsel for plaintiff-in-error thereupon stated that he would take no part in the trial of the action except to object to the Court's jurisdiction, and at proper subsequent stages of the trial he renewed said motion which was in each case denied (fols. 66, 76). At the close of the plaintiff's case a verdict was directed in favor of the defendants-in-error for the full amount of the complaint, to which plaintiff-in-error excepted and judgment was entered accordingly (fols. 67-69).

Defendants-in-error thereupon petitioned for a writ of error (fols. 80-81) which was allowed (fol. 82), obtained a certificate to the United States Supreme Court as to a question of jurisdiction (fols. 75-79) and filed assignments of error (fols. 84-85).

A specification of the errors relied upon and intended to be urged on this appeal is as follows:

1. That the court erred in holding that the defendant by reason of its issuing certain bonds, the principal whereof is payable in the City of New York, in 1909, at the fiscal office of the company in said city, is doing business within the State of New York, so as to be amenable to service of process within said state.

2. That the court erred in holding that the defendant by reason of its issuing bonds, the principal whereof was payable in the City of New York in 1909 at the fiscal office of the company in said City, should be conclusively presumed to have maintained said fiscal office in the City of New York until said bonds were paid, and thereby rendered itself amenable to service of process within the State of New York, made by leaving the same with a vice-president of the Company, residing within the State of New York, but not representing the defendant within the State of New York in respect to any business conducted in said state, even though the Company, at the time the action was brought, maintained no office in the State of New York, owned no property in New York State, transacted no business in said state and was not represented in said state by any person, firm or corporation.

3. That the Court erred in denying the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant.

4. That the Court erred in denying the motion of the defendant to quash the service of summons

attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant when said motion was renewed at the opening of the trial on the ground that the defendant had filed an answer on the merits even though said answer set up as a defense the lack of the Court's jurisdiction over the person of the defendant.

5. That the Court erred in entering a judgment against the defendant which, if enforced against the defendant in accordance with its terms, would, by reason of the absence of personal jurisdiction over the defendant, constitute a taking of its property without due process of law.

POINT I.

The attempted service of process in this action was ineffectual and invalid and, therefore, the Court was without jurisdiction over the person of the plaintiff-in-error and without power to enter judgment in this action.

It is a fundamental proposition that no action can be tried on its merits until all parties involved in the controversy have been given such due notice as will enable them to prepare to defend their rights. It is equally well settled by a long line of decisions in the Federal Courts that it is not such due service on a corporation foreign to the State in which the action is brought, to deliver a writ or other process to an officer or agent of such corporation within said State unless the corporation was engaged in business in the State sued in and the process was served on its duly authorized repre-

sentative who is carrying on said business. This doctrine is so firmly established and has been applied so frequently by this Court in many decisions that we deem it sufficient to refer merely to the language of the Court in some of those decisions without discussing the cases at length.

In St. Clair v. Cox, 106 U. S., 350, Mr. Justice Field unequivocally laid down this rule in the following language, p. 359:

> "Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in Lafayette Insurance Co. v. French, which forbids condemnation without citation, it is sufficient to observe that we are of opinion *that when service is made within the State upon an agent of a foreign corporation, it is essential,* in order to support the jurisdiction of the Court to render a personal judgment, *that it should appear* somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the Court—*that the corporation was engaged in business in the state.* The transaction of business by the corporation in the state, general or special, appearing, a certificate or service by the proper officer on a person who is its agent there would in our opinion, be sufficient *prima facie* evidence that the agent represented the Company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the Company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

That decision was followed in Goldey v. Morning News, 156 U. S., 518, where Mr. Justice Gray said, pp. 521, and 522:

> "It is an elementary principle of jurisprudence, that a Court of Justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the Courts of any other government." * * *
>
> "So a judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there." * * *
>
> "For the same reason, service of mesne process from a Court of a State, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the Court."

The rule was again applied in Green v. Chicago, Burlington & Quincy Railway, 205 U. S., 530. After discussing the facts there involved, Mr. Justice Moody said, pp. 533 and 534:

> "The question here is whether service upon the agent was sufficient, and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. * * *
>
> "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the case of Herndon-Carter Co. v. Norris, 224 U. S., 496, Mr. Justice Day said, p. 499:

> "*It has frequently been held in this Court* that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the state of the Court's jurisdiction, and service must there be made upon some duly authorized officer or agent."

And again in St. L. S. W. Railway Co. v. Alexander, 227 U. S., 218, the same learned Justice said, p. 226:

> "*A long line of decisions in this Court has established* that in order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."

See aso the following authorities:

Reilly v. Philadelphia & R. Ry. Co., 109 Fed., 349.

U. S. Graphite Co. v. Pac. Graphite Co., 68 Fed., 442.

Rust v. U. S. Waterworks Co., 70 Fed., 129.

Swann v. Mutual Reserve Fund, L. Assn., 100 Fed., 922.

Cady v. Associated Colonies, 119 Fed., 420.

Central Grain & Stock Exchange v. Board of Trade, 125 Fed., 463.

Louden Machinery Co. v. Am. Mal. Iron Co., 127 Fed., 1008.

Buffalo Sandstone Brick Co. v. Amer. S. B. Machinery Co., 141 Fed., 211.

Johnson v. Computing Scale Co., 139 Fed., 339.

Phelps v. Connecticut Co., 188 Fed., 765.

Wilkins v. Queen City Sav. Bnk. & Tr. Co., 154 Fed., 173.

Case v. S. L. & Co., 152 Fed., 730.

West v. Cincinnati, etc., Co., 170 Fed., 349.

Craig v. Welch Motor Car Co., 165 Fed., 554.

Goepfert v. C. G. T., 156 Fed., 196.

McGuire v. Great Northern Ry. Co., 155 Fed., 230.

This brings us to a consideration of the question as to whether or not the plaintiff-in-error, The Toledo Railways and Light Company, was "doing business" in New York State at the time of the attempted institution of this action.

The principal business of the Toledo Railways and Light Company is the operation of street railroad and electric properties at Toledo, Ohio, and its principal office is situated in said City. The affidavits of Frank R. Coates, its President (fols. 21-23), and said Frank W. Frueauff (fols. 24-26, 36-39), state the location of said principal office and of said business, and also the following:

That the board of directors of said Company consists of nineteen members, all of whom reside without the State of New York with the exception of three (fol. 23); that Mr. Frueauff though elected as director in April, 1913, was elected a vice-president only in January, 1914, about five months previous to the attempted institution of this action (fol. 25); that since said election as director and vice-president, Mr. Frueauff has never been actively engaged in, or connected with the executive management of the Company, nor has he ever performed any executive duties in connection with the offices he holds; that he has never represented the defendant corporation in any business or transaction in New York State (fol. 25); that he has never received any salary as a director or vice-president, or in any other capacity from said Company (fol. 38); that he is a member of the firm of Henry L. Doherty & Company, public utility financiers and experts, which said firm is consulted as experts on financial engineering and other problems by public utility companies including The Toledo Railways and Light Company, which are subsidiaries of Cities Service Company, a Delaware corporation, in which the firm of Henry L. Doherty and Company is interested (fols. 36 and 37), for which said firm receives a consideration; that at the time of the institution of this action,

The Toledo Railways and Light Company was transacting no business, owned no property and maintained no office in New York State (fols. 23, 25 and 39).

Defendants-in-error contend that on the other hand the Company issued a series of bonds in August, 1901 (25 of which are the basis of this suit), in which the Company covenanted to pay the principal thereof on July 1st, 1909, "at the fiscal office of said Company in the City of New York" with interest payable semi-annually upon presentation of coupons "at the fiscal office of the Company in the City of New York" (fols. 45-49); that the bonds were secured by a mortgage or deed of trust to the United States Mortgage and Trust Company, as Trustee, of the City of New York, said bonds not to be valid until authenticated by said Trustee (fol. 32).

It further appears, from the papers submitted on behalf of the plaintiff-in-error, that said series of bonds when the same were issued were sold to the New York banking firm of Kean, Van Cortland & Co., which firm sold them to its customers (fol. 39). That for the convenience of those customers the interest was made payable at the office of said Kean, Van Cortland & Co., in said City (fol. 38), and was so paid there until about the year 1909, when the Company defaulted in its interest on said bonds, after which said firm of Kean, Van Cortland & Co., ceased to act for the Company in any capacity whatsoever (fol. 39).

From the facts disclosed by the record two questions are raised:

I. Was The Toledo Railways and Light Company ever doing business in New York State by virtue of the fact that the principal and interest of

its bonds were made payable in New York, and that its interest was actually paid there at the office of Kean, Van Cortland & Co., during a certain period?

II. At the time of the attempted service of process, was The Toledo Railways and Light Company doing business in New York State?

The last question is material in the disposition of this case but is only important insofar as this case is concerned.

But the first question is of far greater moment than the mere result of this appeal, and the effect of the decision of this case is of far reaching consequence to corporations over the entire country, especially in view of the language employed by the learned Court below in its decision on the motion to quash service of process. The reasons why the first question is of such importance are these:

Corporations throughout the country, and in fact throughout the Continent, if they do business on a considerable scale, eventually enter into negotiations with a banking house situated in a financial center, particularly New York, for the purpose of effecting their corporate financing. If the financial arrangements involve the purchase and sale of bonds (as they usually do), the New York banking house, which will sell the bonds so purchased to its customers, invariably insists that the principal and interest of the bonds be made payable in New York City, and usually over their own counter, in order to facilitate the presentation of the interest coupons and the bonds for payment, and thus promote the convenience of their customers. It is a matter of common knowledge that there is scarcely any issue of bonds put out through a New York banking which are not made payable, principal and interest, "at the office or agency of

the Company in the City of New York" or "at its fiscal office in the City of New York," and similarly a New York trust company is used as a Trustee under the mortgage securing the bonds; and the more remote from New York City the business and office of the Company issuing the bonds is situated, the more insistent is the banking house that provision be made for the payment of principal and interest in New York City, for the facility of its customers. In many cases, "such office or agency" or "fiscal office" is the very office of the banking house which does the financing. In other cases it is the office of the trust company which is Trustee under the mortgage. And all this is quite irrespective of where the usual or ordinary business of the borrowing company is transacted. And this will continue to be the case as long as New York City is the financial center of the continent, and if some other city becomes the financial center then the financing will be accomplished through some banking house of that city, and the principal and interest of the bonds will be made payable there, even though the company be engaged in working mines in Mexico or operating railroads in Alaska.

Now if it is to be held that an agreement to pay bond interest and principal in New York City, and the actual payment of such interest in New York City is to be construed to be a doing of business in New York, then a multitude of corporations, whose works and business are located in various parts of the North American Continent, will be forced to defend suits brought against them in New York, by service on an officer found here, and the New York Courts will be flooded with such actions.

This is a serious question and one of far greater

importance than the mere disposition of this case and this question is raised by the language of the learned Court below in his opinion in this case. He said (fol. 53):

> "The defendant issued certain bonds and promised to pay those bonds and the interest upon the same in the City of New York.
>
> The contract evidenced by the bonds became, therefore, a New York contract.
>
> Obviously the contract could not be performed—the admitted debt could not be regularly paid, unless the defendant corporation did business within the State of New York.
>
> It has maintained officers within the State of New York; Mr. Frueauff is one of them.
>
> If, therefore, any action had been begun against this Company (at least in relation to these bonds) on or before July 1st, 1909, and service had been effected upon the vice-president of the Company within the State of New York, he being a resident of that State, it seems to me that the service would have been perfect and exactly within Lumberman's Insurance Company v. Meyer, 197 U. S., 407.
>
> What is the difference now? The defendant company is still in existence, it still has directors and a vice-president resident within the State of New York; but it is asserted that no business is or can be done in the State of New York because it refused and neglected to pay a debt which it had promised to pay in this City on July 1st, 1909.
>
> It seems to me that this is a very dishonest argument and that the defendant having (in effect) agreed to engage in business in New York for the purpose of paying its debts, should be conclusively presumed to have kept its own agreement until such debt is paid or merged in judgment."

In brief the decision is that any corporation

agreeing to pay its bonds, principal and interest, in New York State, is doing business in New York State.

We submit that the reasons advanced by the learned Court below are not sound. Assume for example the simple case of a foreign corporation borrowing money from a New York bank on promissory note payable at the bank's office. This would be a New York contract. Then according to the learned Court below "the contract would not be performed—the admitted debt could not be paid, unless the defendant corporation did business within the State of New York." Such a doctrine, we submit, cannot be sustained. The borrowing of money and its payment is not necessarily the doing of business. It may be, and usually is a mere incident to the doing of the usual and ordinary business of the Company and a means of enabling the Company to carry on such business. Similarly the borrowing of money evidenced by bonds with interest coupons attached, and the payment of such bonds and coupons, is not the transaction of business by the Company. It is done to put the Company in funds to transact its business.

It is clear that the learned Court below begs the entire question presented, when he stated that the admitted debt could not be regularly paid unless the defendant corporation did business within the State of New York, for one of the essential questions before him was whether or not the agreement to pay the debt, or the paying of the same, constituted the transaction of business.

We submit that the authorities on the question uphold our position. While we do not intend to review at length the multitude of decisions which

endeavor to define the term "doing business," we beg to call the attention of this Court to some cases which involve facts analogous to the present situation.

In the case of Honeyman v. Colorado Fuel and Iron Company, 133 Fed., 96, service was made upon a foreign corporation by serving a director, resident in New York. The question arose as to whether or not the Company was doing business in New York. The complainant urged that it was doing business because:

I. It had, in the City of New York, an office, and officers, and facilities for registering stock.

II. It kept a bank account in New York.

III. The directors met in New York for the performance of duties.

IV. Certain transactions relating to capital were in progress in such State.

Thomas, D. J., held that the fact that the Company has an office in New York for the registration of transfers of stock and that it had a bank account in New York City, upon which checks were drawn by officers out of the State, did not constitute the doing of business; that there was no evidence as to the nature of the business transacted at the directors' meetings in New York State, and, therefore, the mere fact of the holding of the meetings in New York could not be held to be a doing of business there; and the fact that a plan was in progress to re-assemble the properties of the Company, under common ownership through a committee, did not constitute in itself the doing of business, even though the corporation is privy to the arrangement, had consented to carry it out

and will do what is necessary to carry it out when the plan is ready for final consummation, for, he concludes, there is no presumption that the Company will do any act in the State of New York in the fulfillment of the plan. He goes on to say (page 99):

> "The litigation proposed in the suit at bar obviously relates to the capital of the corporation, *and its relation to its bondholders and creditors.* Such a litigation properly should be conducted under the sovereignty that authorized the corporation or directly or impliedly permits it to do business within its borders, and where such business , in *real substance* is done. It is very evident that the actual business for which the corporation was organized, and which it usually carries on, is not to the slightest extent done in the State of New York."

The case of Union Trust Company v. Sickels, 109 N. Y. Supp., 262 (App. Div., 4th Dept.), involves an action on contract, in which the defendant demurred to the complaint on the ground that the corporation was doing business in New York without having procured a license from the Secretary of State, and that, therefore, it could not maintain such an action in the New York Courts.

Robson, J., delivered the opinion of the Court, and said in part (page 265):

> "What the expression 'doing business' or to 'do business', within this state, as used in the statute, really means, has received judicial attention in may cases; but, except in the present case, it does not seem to have been yet held that a foreign corporation was doing business in this state, within the meaning of the statute, when it had done no business therein beyond presenting for sale and *selling*

to individual purchasers, or floating on the market, either its stocks or its bonds. Payson v. Withers, 19 Fed. Cas., 29, 30 (No. 10,864). The plain reading of the statute shows that it was intended to prevent a foreign stock corporation from doing in this state the business for the doing of which it was organized until it had procured the required certificate, *and that it does not contemplate a prohibition either of the sale of its stock or borrowing money on its obligations. It obviously relates only to the regular and customary business operations of the corporation.* Potter v. Bank of Ithaca, 5 Hill, 490; People v. Horn Silver Mining Co., 105 N. Y., 76, 11 N. E., 155; Beard v. Union & American Pub. Co., 71 Ala., 60-62. What business the United States Independent Telephone Company was organized to conduct does not appear in the complaint, except as its name may give some indication of its character. But in what place, or within what territory, that business was to be conducted, or was actually carried on, does not appear, either by direct allegation or warrantable inference, from any fact disclosed by the complaint. It follows that the complaint does not show that this company was doing business in this state, and therefore, on the facts now appearing, neither it nor its assignee was precluded by the statute referred to from maintaining an action on the contract set forth in the complaint."

The case of People v. Feitner, 78 N. Y. Supp., 1017 (App. Div., First Dept.), is concerned with a tax statute of New York state imposing taxes for "doing business" in the State.

McLaughlin, J., said in part (page 1018):

> "But this corporation was not doing business in the State of New York in the sense in which that term is used in the statute. * * * The office which it had here was used simply

> for the purpose of enabling the directors to meet in it and declare dividends upon its preferred stock, and the cash on hand and money in bank was for the purpose of paying such dividends when declared. * * * Can it be said, simply because a foreign corporation has an office in the State of New York, in which directors meet for the purpose of declaring dividends, and then has money sent from its principal office to New York, with which to pay those dividends, that it makes it liable to taxation? Manifectly not."

In the case of Wadsworth v. The Equitable Trust Company of New York, 153 App. Div., 737, Dowling, J., held (page 739):

> "Upon the agreed state of facts, it appears that the Pacific Gas and Electric Company has never owned, rented, occupied or had an office of its own within the State, nor any office for the transaction of business therein, nor had it transacted any business therein. The defendant, as its transfer agent, keeps certain books in New York City which are used for the purpose of entering transfers of stock, duplicate sheets of which are sent to the transfer office of the Pacific corporation in the State of California. It is apparent, therefore, that no portion of the business for the transaction of which the foreign corporation was organized is carried on within this State. The maintenance by it of a transfer office in New York City was for the convenience of stockholders and facilitated the sale of its stock, but it did not constitute 'doing business' or the 'transaction of business' within the meaning of the statute."

It is apparent from the decisions above that the term "doing business" should be construed to mean the doing of the ordinary and usual business for which the Company was formed, and has no con-

nection with those acts whereby the Company acquired funds wherewith to carry on said business, or its agreements for taking care of its obligations when the same mature.

In concluding our discussion of this point we beg to again call the attention of this Court to the far-reaching consequences of their decision of this question.

Conceding for the moment that the Toledo Railways and Light Company was actually paying its bond interest in New York City at the time this action was instituted and had outstanding bonds which were payable, principal and interest, in New York State, we submit that said Company would not have been "doing business" in New York State at the time so as to give the Courts in said State jurisdiction over its person by service of process on one of its officers found there.

We submit that the case of Lumbermen's Insurance Company v. Meyer, 197 U. S., 407, is not analogous to the case at bar. That case involved an insurance company of the State of Pennsylvania, whose principal business was to solicit and write insurance, and to pay the amount of its policies when losses occurred. It appears in that case that one-third in amount of the Company's policies covered property situated in New York State, that it continually sent representatives into New York State to solicit and get business (one of the objects for which it was incorporated) and in its policies it agreed that the Company would either pay the amount of the loss or rebuild at its own expense, an act which obviously could not have been performed except at the place of loss. That upon the occurrence of losses it sent its representatives into this State to negotiate settlements, and

make adjustments under the policy and it was one such representative or adjuster who was served with process. The Court in that case rightly held that the Insurance Company was doing business in New York, and upheld the service of process as valid, but it seems quite clear that the facts in that case prevent that decision from being a precedent upon which this case can be decided.

The second question which the facts of this case present is whether at the time of the attempted service of process The Toledo Railways and Light Company was doing business in New York State.

Even if it should be held that the mere fact of paying interest coupons in New York State by a foreign corporation constitutes "doing business" in said State, nevertheless the facts disclosed by the record in this case show that The Toledo Railways and Light Company had ceased performing said act in 1909—five years before the attempted institution of this suit—when the Company defaulted in the payment of its bond interest and since that time it has never paid such interest (fol. 38). It was this default and the subsequent default in the payment of the principal of these bonds (and also an issue of prior lien bonds) on July 1st, 1909, which resulted in proceedings for the reorganization of the Company, which were consummated in February, 1913, a year before this suit was started (fols. 60-63). The interest, during the years when it was paid, was paid at the office of Kean, Van Cortland & Co. (fol. 38), but after such default said firm ceased to act in any capacity for The Toledo Railways and Light Company (fol. 38).

So the fact appears to be that at the time of the attempted institution of this action The Toledo

Railways and Light Company had not been paying any interest in New York State for five years.

The learned Court below announced a principle in its decision of the motion to quash service, which, we submit is not sustained by any decision or authority which has come to our attention. It is contained in the following language (fol. 54):

> "but it is asserted that no business is or can be done in the State of New York because it refused and neglected to pay a debt which it had promised to pay in this City on July 1, 1909.
>
> It seems to me that this is a very dishonest argument and that the defendant having (in effect)agreed to engage in business in New York for the purpose of paying its debts, should be conclusively presumed to have kept its own agreement until such debt is paid or merged in judgment."

It will be noted that the Court cites no authority to sustain its doctrine, nor has learned counsel for the defendants in error in any of the briefs heretofore submitted, and we submit that the doctrine is a novel one and not sound in law. Why the Company "should be conclusively presumed to have kept its own agreement" is not, we submit, apparent, and what "agreement" the learned Court below refers to is also not clear. The most material agreement which it failed to keep was to pay its obligations when due, and this it defaulted in for the obvious reason that the Company was in financial difficulties and was unable to meet its maturing obligations or to refund or re-finance them. No doubt the learned Court below construes the bond to contain an implied agreement that it would maintain a fiscal office in New York for the payment of its bonds, and that this was the agree-

ment "it should be conclusively presumed to have kept." But why such a presumption in the face of the fact that it had no such office? Why conclusively presume that it kept an implied agreement to maintain an office any more than conclusively presume that it kept its agreement to pay its obligations—both of which it failed to do as the facts stand?

The Court's jurisdiction over the person of a defendant must, we submit, be acquired by virtue of *existing facts* rather than by any *conclusive presumptions.* If the doing of business is a jurisdictional fact which is to form the basis of jurisdiction over the person then, we submit, such fact must be a *reality* and not a fiction derived from presumptions before it can be said that a defendant "is found" within the Court's jurisdiction.

We respectfully submit that the conclusion of the learned Court below, whereby jurisdiction is sustained over the person of The Toledo Railways and Light Company by virtue of a conclusive presumption that it kept its agreement (if there is such a one) to maintain an office, is unsound, and that the Court must look to the facts for its jurisdiction.

It will be noted that the Court below avoids expressly stating that he was relying upon the doctrine of estoppel, although his opinion gives a strong impression that it was something akin to estoppel which he is seeking to enforce upon The Toledo Railways and Light Company. For it is clear that the doctrine of estoppel is quite inapplicable to the present case. Estoppel is a bar which precludes a person from denying the truth of an existing fact which has, in contemplation of law, become settled by the act of the party himself express or implied, and in the law of contracts

if, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped from denying the existence of that fact. It will be noted that the law of estoppel applies only where the parties have changed their legal positions or acted upon the representation of a fact as existing, and has no application whatsoever to an agreement to do something in the future. The law of estoppel has no bearing upon the situation in which the aggrieved party claims that he has changed his legal position by virtue of a promise to perform an act which the other party made. In such a case a simple cause of action for breach of contract lies.

Another instance in which the learned Court below has, we submit, fallen into error is contained in the following statement:

> "The contract evidenced by the bonds became, therefore, a New York contract.
>
> Obviously the contract could not be performed, the admitted debt could not be regularly paid, unless the defendant corporation did business within the State of New York."

This proposition has been refuted by the Supreme Court of the United States. It has been held by this Court, in a recent decision, that the fact that a cause of action arose in New York State was not sufficient to give the Courts of that state jurisdiction over a corporation foreign thereto unless, in addition, such corporation was doing business in New York. This was the case of St. Louis S. W. R. Co. v. Alexander, 227 U. S., 218. The defendant in that action, as appears from the opinion of the Court, was a railroad company which agreed to transport goods to New York City. It failed to do so. By reason of that fact, the

Court concluded that the cause of action had accrued in New York State. Service in that action was made upon a resident director and in the motion to vacate the service, the Court sums up the questions presented by the motion as follows (p. 226):

> "In this class of cases where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, *two* questions ordinarily arise: *the first, Was the corporation within the jurisdiction in which it is sued? the second, Was process duly served upon an authorized agent of the corporation?* As to the latter question, there is little difficulty in this case. The *cause of action having accrued in New York* by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. Pennsylvania Lumbermen's Mut. F. ins. Co. v. Meyer, 197 U. S., 407.
>
> "*The other question* as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. *A long line of decisions* in this court has *established* that in order to render a corporation amendable to service of process in a foreign jurisdiction, *it must appear that the corporation is transacting business in that district* to such an extent as to subject it to the jurisdiction and laws thereof."

We can paraphrase the opinion thus stated in the following language:

Even though the cause of action against a foreign corporation arose in New York State and the service of process was made by delivering the same to a resident director, such service is invalid if the corporation was not transacting business in said State at that time. The Court in that case,

after examining the facts therein, determined that the Company was so doing business. It found that it maintained an office in New York City with a general eastern freight agent and a traveling freight agent and through said office, it transacted business incident to the operation of a railroad.

It is apparent that the decision of the learned Court below in this case is in direct conflict with the decision of the United States Supreme Court in the Alexander case, *supra;* for the Court below has concluded that because the contract was to be performed in New York, therefore, said performance could not be completed unless plaintiff-in-error was doing business in New York. In other words, by the very performance of its contract, or the agreement to perform in New York, it was *ipso facto* "doing business" in New York. Whereas the United States Supreme Court in the Alexander case, *supra,* when dealing with a cause of action arising upon a contract to be performed in New York, concludes that this fact alone does not confer jurisdiction in New York but that another question must be decided, to wit, was the corporation doing business in New York?

We also beg to bring to this Court's attention another expression which occurs in the opinion of the Court below, and which concerns a question of fact. That is this: "It (plaintiff-in-error) has maintained officers within the State of New York; Mr. Frueauff is one of them" (fol. 53). We maintain that the record in this case can be searched in vain for any evidence to support this statement. It is admitted, of course, that Mr. Frueauff is a Director and Vice-President of The Toledo Railways and Light Company, and that he resides in New York State. But this fact, of course, is not sufficient to confer jurisdiction.

See,

Connolly v. Mathieson Alkali Works, 190 U. S., 406, and
Kendall v. American Automatic Loom Co., 198 U. S., 477.

In order to confer jurisdiction it must appear in addition that the Company was doing business in New York, and that the officer in question was representing the Company in its business. What does the record disclose? Mr. Coates, the president of the Company, at Toledo, swears in his affidavit that Mr. Frueauff, although a director and vice-president, has never been actively engaged in, or been connected with, the executive management of The Toledo Railways and Light Company, nor has he ever performed any executive duties in connection with said offices (fol. 23). Mr. Frueauff, in his affidavit, swears to the same facts, and further states that he has never represented The Toledo Railways and Light Company in any business or transaction in New York State (fols. 25, 38), and that he receives no salary from The Toledo Railways and Light Company as a director or vice-president, or in any other capacity (fol. 38).

It is difficult to see how the learned Court below could have come to the conclusion that The Toledo Railways and Light Company was *maintaining* Mr. Frueauff as vice-president in New York State.

Counsel for defendants-in-eorror point to various facts that appear in the records both from Mr. Frueauff's own affidavits and those submitted by defendants-in-error. It appears that Mr. Frueauff is a member of the firm of Henry L. Doherty and Company, public utility financiers and experts (fol. 36) and as such are interested in a corporation

known as Cities Service Company, a Delaware corporation, which owns public utility securities of operating companies in various parts of the United States and Canada; that in February, 1913, a reorganization of The Toledo Railways and Light Company was consummated whereby practically all of the outstanding securities of The Toledo Railways and Light Company were gathered up in a holding company formed for that purpose known as Toledo Traction, Light and Power Company (fol. 61 *et seq.*); that the firm of Henry L. Doherty and Company underwrote such of the preferred and common stock of the new Company which was not subscribed for the old stockholders (fol. 42); that the stock so underwritten was acquired by Cities Services Company and amounted to approximately 30% of the outstanding stock of the new Company; that the firm of Henry L. Doherty and Company is frequently consulted as public utility experts on financial engineering and other problems by public utility companies including The Toledo Railways and Light Company, for which said firm receives a consideration (fol. 37). Counsel for defendants-in-error has also included in their affidavits contained in the record, excerpts from Poor's Manual and bond circulars, in which occur expressions that Doherty and Company have "assumed the management" of The Toledo properties, and that the voting trustees of the new Company "will contract with us (Doherty and Company) for the management of the property."

We submit that the record is clear that The Toledo Railways and Light Company is being managed by its officers in the City of Toledo as evidenced by the affidavit of such officers and that the

vague and loose expressions drawn from financial papers and bond circulars present no basis for a contrary view.

Again we submit that there is no basis in the record for the statement of the learned Court below that the plaintiff-in-error "has maintained officers in New York State."

In conclusion of this point, we again reiterate that on all the facts disclosed in the record The Toledo Railways and Light Company was doing no business, maintaining no office and had no property in the State of New York at the time of the attempted service of process in said State; and that by reason of the foregoing the Court below acquired no jurisdiction over the person of The Toledo Railways and Light Company, and that, therefore, the judgment of the Court below is a nullity.

POINT II.

The plaintiff-in-error has preserved its right to challenge jurisdiction in this action.

After attempted service of process herein, plaintiff-in-error appeared specially for the purpose of effecting a removal to the United States District Court (fol. 10). After removal, it appeared specially for the purpose of moving to quash service (fol. 19). This is strictly in accordance with the principles laid down in the cases of Goldey v. Morning News, 156 U. S., 518, Martin v. B. & O. R. R. Co., 151 U. S., 673; Wabash Western Railway Co. v. Brow, 164 U. S., 271, Cain v. Commercial Publishing Company, 232 U. S., 124.

Upon the denial of the motion to quash service of process there was no opportunity to appeal until after final decree. (See McLish v. Roff, 141 U. S., 661.) And there was nothing for the defendant Company to do in order to preserve its rights but file its answer to the merits. After final decree opportunity was then offered to appeal direct to the Supreme Court of the United States on the jurisdictional question.

Board of Trade v. Hammond Elevator Co., 198 U. S., 424.

Remington v. Central P. R. Co., 198 U. S., 95.

Kendall v. American Automatic Loom Co., 198 U. S., 477.

When this case came on for trial before Grubb, J., the learned Court was of the opinion that by filing answer to the merits the plaintiff-in-error had effected its right to urge the jurisdictional question, but this question has been disposed of by Wabash Western Railway Co. v. Brow, *supra*, and St. Louis S. W. R. Co. v. Alexander, 227 U. S., 218. The procedure established in the latter case was followed precisely in bringing this case from its inception to the perfection of the present appeal, with the exception that in the Alexander case counsel for the Railroad Company actually participated in a trial before a jury and a judgment for money damages was awarded against the Railroad Company.

In view of the above decisions there can seem to be no question that the plaintiff-in-error has fully protected its right to urge the jurisdictional question before this Court on this appeal.

POINT III.

It is respectfully submitted that judgment in this action should be reversed.

Respectfully submitted,
CHARLES A. FRUEAUFF,
Counsel for Plaintiff-in-Error.

BRIEF OF DEFENDANTS IN ERROR

INDEX.

CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1916.

THE TOLEDO RAILWAYS & LIGHT COMPANY, Plaintiff-in-Error, against WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Defendants-in-Error.	No. 200.

BRIEF OF DEFENDANTS-IN-ERROR.

Preliminary Statement.

This is a writ of error sued out by The Toledo Railways & Light Company, plaintiff-in-error, to review a judgment rendered against it by the United States District Court for the Southern District of New York, in the amount of $36,036.05, entered in the office of the Clerk of the said court on the 26th day of June, 1915 (Record, p. 31), after trial before the said Court and a jury (Record, p. 31). The claim of a right to a direct review in this court is founded upon the certificate of the Trial Judge that the question of the jurisdiction of the Court over the person of the defendant corporation was in issue (Record, pp. 36-37).

The plaintiffs are the executors of the last will and testament of one Harford B. Kirk, during his lifetime a citizen of the State of New York, and are themselves, respectively, citizens of the State of New York and of the State of Massachusetts. The defendant is a corporation organized under the laws of the State of Ohio (Record, p. 5).

The judgment represents the amount due upon twenty-five (25) bonds, with certain coupons attached thereto, issued by The Toledo Railways & Light Company (hereinafter referred to as the "defendant") on the 1st day of August, 1901, and by their terms made payable (as is the interest thereon) *at the fiscal office of the company in the City of New York* on the 1st day of July, 1909 (Record, p. 3).

The action was instituted on the 29th day of June, 1914, in the Supreme Court of the State of New York, by the personal service within the state of a summons and complaint upon one Frank W. Frueauff (Record, p. 5), a resident of the State, who at the time of the service of the summons was a vice-president of the company (Record, p. 12), and for a year or more prior thereto had been one of its directors (Record, p. 5). On the 21st day of July, 1914, as the result of an application made by the defendant, the action was removed to the United States District Court for the Southern District of New York (Record, p. 7), and on the 12th day of September, 1914, the defendant moved before that court to vacate and set aside the service of the summons and complaint, on the ground that the service thereof

> "was not sufficient to confer upon the District Court of the United States jurisdiction over the person of the defendant, and was not due service upon the said defend-

> ant corporation, inasmuch as the said corporation is organized under the laws of the State of Ohio, maintains no office in New York State, does no business, and owns no property therein" (Record, p. 10);

upon this application the defendant procured from the Court a restraining order staying all proceedings pending the decision of the said motion, and directing that the defendant's time to plead or make such motion relative to the complaint as it might be advised be extended until five days after the entry of an order therein and the service of notice of entry thereof (Record, p. 10).

On the 7th day of October, 1914, an order was made by the said District Court denying the motion, reciting that in the opinion of the Court the admitted facts sufficed for such denial, and granting to the defendant leave to answer or demur in the said action on or before the 15th day of October, 1914 (Record, p. 27).

On the 10th day of October, 1914, the defendant, having secured by means of these orders of the Court and otherwise a delay of eighty-two days in its time to plead,* filed its answer—wherein it set up defenses, including a denial of certain of the allegations of the complaint, what purported to be an affirmative defense on the merits, and what purported to be the defense that the Court had no jurisdiction over the person of the defendant in the action (Record, pp. 27-30).

This is pleaded in the following terms:

> "Ninth. That the plaintiffs above named attempted to institute this action and to serve process in the State of New York upon

* Sections 421, 422 of the New York Code of Civil Procedure provides (printed at page 42 of this brief).

> the defendant herein by delivering within said state a copy of the summons and complaint to one Frank W. Frueauff, a Vice-President and Director of the Company, who resides therein. *That at the time of the attempted institution of this action,* Toledo Railways & Light Company owned no property in New York State, maintained no office and transacted no business herein. Upon information and belief, that the attempted service of said process was invalid and ineffective and conferred no jurisdiction upon this Court over the person of the defendant and that by reason thereof, this Court has no jurisdiction over the person of the defendant in this action" (Record, pp. 29-30).

By means of the interposition of this answer the defendant succeeded in delaying the trial of the cause for an additional eight months, so that the plaintiff was prevented from securing the judgment to which he was concededly entitled on the merits until the 18th of June, 1915 (Record, p. 31).

Upon the trial, the defendant abandoned all the defenses interposed in the answer, including the defense of lack of jurisdiction above set forth, and confined itself to an attempt to procure the Trial Judge to review the ruling made by another District Judge on the motion to quash the service of the summons and complaint made prior to the interposition of the answer. The practice adopted was a peculiar one. The motion addressed to the Trial Court was not an application to renew the motion to quash the service, such as would have permitted the plaintiffs to introduce by means of answering affidavits such reply thereto as might be available to them, including any facts that they might have discovered since the original motion was made and denied, or such as they had been unable to

present on that original motion, but was based upon *all* the motion papers submitted on the first motion, including the affidavits submitted on the part of the plaintiffs, and was thus an attempt to procure from the Trial Judge a review of the decision made by a Judge of co-ordinate jurisdiction. The motion thus made the Trial Judge refused to entertain on the ground both that the matter had already been decided, and that conceived as an original motion it was made too late, since made only after the filing of an answer on the merits (Record, p. 36).

Having made this motion and renewed it at the close of the case, and having recorded his exceptions to the denials thereof, the defendant desisted from any further participation in the trial, and offered no evidence in support, either of his alleged defense on the merits or of the allegations contained in his answer relating to his claim of the lack of jurisdiction over the person of the defendant. And, accordingly, after the submission of evidence on the part of the plaintiffs, which has not been included in the record, by means of a bill of exceptions or otherwise, the Court directed a verdict in their favor for the full amount of their claim (Record, p. 31).

Thereupon the defendant sued out its writ of error, dated July 2nd, 1915, to review the judgment entered upon the direction of this verdict and upon the said writ of error and assignments of error, dated July 1, 1915, and a certificate of the Trial Court, dated the same day, and without any bill of exceptions, it seeks a review of the said judgment in this court.

Upon the record thus presented, the following questions arise for the determination of this Court:

1. Whether the motion to quash the writ was properly decided in the first instance.

2. Whether such objection to the jurisdiction as might originally have been effective was waived by the invocation of the powers of the Court through the application of the extensions of time to plead and the acceptance of the benefits conferred by the orders extending the time to plead.

3. Whether in the absence of any offer on the part of the defendant to introduce evidence bearing upon the jurisdiction of the Court over the person of the defendant, and in the absence of a bill of exceptions, the writ of error brings before this Court any question which it will review.

I.

The facts adduced on the original motion to quash the service of the summons and complaint suffice to establish that jurisdiction over the person of the defendant had been rightfully acquired.

The Facts.

In the affidavits submitted to Judge HOUGH on the motion to vacate and set aside the service of the summons and complaint the following facts were set forth:

On August 10th, 1901, the defendant corporation executed and delivered to the United States Mortgage & Trust Company of the City of New York a mortgage or deed of trust whereby it conveyed to that company "all real and personal prop-

erty, rights, privileges, grants and franchises of said" (defendant) "company, including all properties and rights thereafter to be acquired by it or consolidated with it" (Record, p. 23), and thereby brought within the State of New York, constructively at least, and subjected to the jurisdiction of the courts of that state everything it possessed or could thereafter acquire, including even the franchises granted to it by the state of its incorporation. It is to be assumed that this contract was executed or delivered within the State of New York, since at the time of its execution trust companies organized under the laws of that state were forbidden to transact any business elsewhere than in a city named in the certificate of incorporation, which of course was required to be a city within the State of New York (see Laws of 1893, Chapter 696).*

The transfer of all its property was made to secure an issue of bonds in the aggregate amount of $1,200,000—of which the bonds in suit formed a part—which could be authenticated and made available for its uses only through a certificate to be executed by the said trust company (Record, p. 23), and hence by an act which could only be performed within the State of New York. And thus the very obligation upon which the suit was brought *came into being* through an act necessarily *performed* within the State of New York.

The bonds, themselves, and the interest thereon were made payable *"at the fiscal offices of said company"* (the defendant corporation) "in the City of New York," so that the contract involved therein was agreed to be *performed* within the State of New York (Record, p. 22).

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* Printed at page 42 of this brief.

For a number of years the interest on these bonds was actually paid at an office in the City of New York (Record, p. 19); and it appears inferentially that until the month of October, 1913, the corporation kept within the State of New York property of a nature unspecified (Record, p. 12).*

In February, 1913, after having defaulted on the payment of its bonds when they became due (Record, p. 3), the firm of Henry L. Doherty & Co. undertook a "reorganization of the securities" of said company (Record, p. 18), and advertised, as one of the elements of the said reorganization of the securities of the company, that they had an arrangement whereby they were to agree to direct the management of the company for a period of five years (Record, p. 21); and in April, 1913, Frank W. Frueauff, the person who has served with process in this action (who was a member of the firm of Henry L. Doherty & Co.) (Record, p. 18) became a director of the said defendant company (p. 13) in pursuance, as it may reasonably be presumed, of the agreement above described, and in like manner, also presumably in pursuance of the said agreement, he became vice-president of the company in January, 1914 (Record, p. 13), five months before this action was begun, while his partner, Mr. Henry L. Doherty, also a resident of the state, and another person also associated with the firm who was a resident of New York, became directors of the said company (Record, p. 19).

By the said motion papers it appeared, therefore, that the company was being sued upon an obligation having its legal inception within the State of

*This inference is drawn from the statement contained in the affidavit of Frank R. Coates, President of the corporation, that the "said defendant company has not now, nor has it had since the month of October, 1913, any property in the State of New York."

New York, which by its terms was to be performed, not merely within the State of New York, but *at an office to be maintained by the company in* that state, and which was secured by the transfer of all its assets to a New York corporation. And by the said papers it appeared further that the said company was endeavoring to escape an exercise by the Courts of the State of New York of their powers to enforce the obligations thus undertaken solely on the theory that, by failing to perform those obligations and by failing to continue the office within the state until they had been performed, it had succeeded in exempting itself from the jurisdiction of the New York courts and had thereby created a situation whereby those who had relied upon its promises, and who had become entitled to the fulfillment of those promises within the state, were relegated to the expense and inconvenience of a proceeding to be instituted in the Ohio courts, in order to secure their just rights.

This contention, as well as the contention that Mr. Frueauff—by swearing that he had never been "*actively*" engaged in or connected with the "*executive*" management of the defendant corporation in any business or transaction in the State of New York—had divested himself of the representative character which his position as director and vice-president presumably imposed, and which the laws of the State of New York attribute to him, impressed the learned District Judge as "a very dishonest argument" (Record, p. 26). And hence, without directing such an inquiry as might otherwise have been had before a master to test the ingenuousness of the general allegations made by the officers of the defendant in their affidavits, and without calling upon the plaintiffs for such further proof as might have been adduced by

means of such an investigation, he decided that the "admitted facts" were sufficient to justify a decision, and denied the motion to quash —leaving it to the defendant to reassert its challenge, if it chose, through an answer under which the facts might be ascertained by means of the production of witnesses and documents and the truth might be sifted by the processes of cross-examination, for which the trial would offer full opportunity.

Of the opportunity thus afforded the defendant declined to avail himself; and, while it filed an answer under which evidence might have been introduced to substantiate its contentions, it declined to offer any evidence on the issue or to subject its officers to a cross-examination with respect to the matters to which they had sworn with such freedom in their affidavits.

That the characterization of the argument by the learned District Judge was merited, we conceive that no one would undertake to deny; and the sole question for consideration, therefore, upon this branch of the case is, whether, in spite of its dishonesty, it must be permitted to prevail.

The Law.

A consideration of the principles upon which the jurisdiction of courts of one state over corporations organized in another has been challenged makes it, as we conceive, transparently clear that this question is to be answered with an emphatic negative.

It is impossible, of course, to posit any particular fact or series of facts or circumstances as the universal and inevitable conditions to the ac-

quisition of jurisdiction over a foreign corporation, and each case as it arises must necessarily be left to be determined on its own particular facts.

Washington-Virginia Railway Co. v. *Real Estate Trust Co.*, 238 U. S., 185, 186.
St. Louis S. W. Ry. Co. v. *Alexander*, 227 U. S., 218, 228.
Commercial Mutual Accident Co. v. *Davis*, 213 U. S., 245, 255.

But the principle underlying the decisions whereby the criteria to the existence of the jurisdiction have been established is clear and well settled. *Jurisdiction attaches as the result of acts indicating the submission by the corporation to the exercise of the judicial power of the state.*

Washington-Virginia Ry. Co. v. *Real Est. Trust Co.*, 238 U. S., 185, 186.
St. Louis S. W. Ry. Co. v. *Alexander*, 227 U. S., 218, 227.
Lafayette Ins. Co. v. *French*, 18 How., 404, 407.

"As this court has had frequent occasion to say, each case of this kind must depend upon its own facts, and the question is whether the defendant corporation had submitted itself to local jurisdiction and was present therein so as to warrant service of process upon it."

Washington-Virginia Ry. Co. v. *Real Est. Tr. Co.*, 238 U. S., at p. 186.

"The inquiry is not whether the defendant was personally within the state, but whether he, or someone authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether

> he was bound to appear or suffer a judgment by default."
>
> *Lafayette Ins. Co.* v. *French,* 18 How., 404, 407.
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> * * * * * *
>
> "We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that state, in suits founded on such contracts" (*ib.,* p. 408).

This submission may be evidenced in divers ways. It is implied whenever a foreign corporation causes or permits a general appearance to be entered in an action brought against it, or enters an answer upon the merits without first reserving a right to object to the jurisdiction.

> *Lafayette Ins. Co.* v. *French,* 18 How., 404, at 407.

It is implied in spite of the reservation of the right to object to the jurisdiction whenever the foreign corporation becomes an actor in the action.

> *Merchants Heat & L. Co.* v. *Clow & Sons,* 204 U. S., 286, 290.

It will result from an express promise made to an individual or class of individuals, and contained in a contract entered into with them or for their benefit, though in such case it is available only to those for whose benefit it is made.

> *Woodw[redacted]* v. *Mutual Life Ins., Co.,* 178 N. Y., 485, 490.
>
> *Hunter* v. *Mutual Reserve Life Ins. Co.,* 218 U. S., 573, 587.

(In the first of these cases a stipulation in regard to service of process, incorporated in the designation of an agent, made pursuant to the laws of the state, was held to become an obligation of the company "precisely as though it had been incorporated in the policies," and this reasoning was quoted with approval in the *Hunter* case, *supra*).

It will result also from an express contract made with the state evidenced by the acceptance of the terms imposed by the state as the condition of an exercise by the corporation of the privilege of doing business within its borders, and in that case, it is as comprehensive in its scope as the terms in which it is expressed.

> *Bagdon* v. *Phil. & Read. C. & I. Co.*, 217 N. Y., 432.

It is implied from the exercise of the privilege of doing business within the state, even though there is no express compliance with the conditions imposed by the state statute, but in that case it is limited to an acquiescence in the jurisdiction of the courts of the state over controversies resulting from the activities conducted within its borders.

> *Wash.-Va. Railway Co.* v. *Real Est. Tr. Co.*, 238 U. S., 185.
>
> *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S., 8, at p. 21.
>
> *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S., 602.
>
> *Lafayette Ins. Co.* v. *French*, 18 How., 404.

When the submission to the jurisdiction is sought to be based upon the transaction of business within the state, the extent and nature of the

business to which that effect will be accorded is dependent in some measure upon the relation of the cause of action to the transaction had within the state, and decisions bearing upon the nature or frequency of the acts necessary to constitute a doing of business, such as would subject the corporation to the operation of tax laws or to the exercise of the visitorial powers of the state, are of little or no criterial significance.

In order to constitute a complete submission to the jurisdiction such as will sustain the exercise of the powers of the Court in suits brought to enforce transitory causes of action arising in other jurisdictions, it may be necessary to establish an express contract with the state, thus unlimitedly to submit to its jurisdiction.

> *Bagdon* v. *Phil. & Read. C. & I. Co.,* 217 N. Y., 432.

In order to establish a submission sufficiently general to sustain the jurisdiction of the state courts in an action arising within the state, but unrelated to the activities upon which the submission is predicated, it may be necessary to establish a continued and active exercise by the foreign corporation of its functions within the state. On the other hand, where the cause of action is based upon a transaction had within the state or upon a contract with a resident of the state which by its terms is to be performed within the state, a series of acts, or perhaps even a single act, done in connection with that contract or with contracts of like character may suffice to evidence the submission to the jurisdiction.

> *Conn. Mut. Life Ins. Co.* v. *Spratley,* 172 U. S., 602, 610, 611.

Mut. Reserve Fund. Life Ass'n v. *Phelps,* 190 U. S., 147.
Penn. Lumbermen's Ins. Co. v. *Meyer,* 197 U. S., 407.
Commercial Mut. Accident Co. v. *Davis,* 213 U. S., 245, 246.
Lafayette Ins. Co. v. *French,* 18 How., 404, 407.

Thus, an insurance company, which has once been licensed to do business within the state, will be held to be continuing to do business therein for the purpose of sustaining the jurisdiction of the Courts over an action upon a policy written during the period when it was in active conduct of business within the state solely by permitting those policies to remain in force, and by accepting either within the state or at its home office the premiums payable on those policies.

Conn. Mutual Life Ins. Co. v. *Spratley,* 172 U. S., 602, 610, 611.
Mutual Reserve Fund Life Ass'n v. *Phelps,* 190 U. S., 147.
Commercial Mut. Acc. Co. v. *Davis,* 213 U. S., 245, 255.

The acts upon which this Court reached its conclusions in the case last cited appear in the following quotation from its opinion (pp. 255-256):

> "Was the defendant doing business in the State of Missouri? The record discloses, and the Court has found, that it had other insurance policies outstanding in the State of Missouri. Upon these policies undoubtedly premiums were paid, and it was the right of the company to investigate losses thereunder, to have an examination of

> the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment of any loss. The record shows that the company sent Dr. Mason to Fayette to investigate the loss sued for in this case, and later, at the time of the service of the process, Mason was in Missouri with full authority to settle the loss in controversy."
>
> * * * * * *
>
> "We are of opinion that the finding of the Court in this case is supported by testimony, and that the corporation was doing business in Missouri."

And an insurance company which has never sought or obtained leave to do business within the state, which has never maintained within the state an agency for the purpose of writing policies therein, has never sent its agents within the state for the purpose of direct solicitation of business, which has accepted applications for insurance from residents of the state only when sent to it through the mails directed to its home office, has never issued any policies within the state, and whose policies are not payable within the state, will none the less be held to have been doing business within the state to an extent sufficient to sustain the jurisdiction of the state courts over an action brought by a resident policy holder on his policy if it does no more than send its agents within the state to view the premises to which the policy applies, and to attempt to adjust the losses payable under it.

> *Penn. Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S., 407, 414.

In this case the basis for the conclusion that the insurance company, whose activities were limited to the acts above set forth, was none the less doing

business within the state, are set forth in the opinion in the following terms (p. 414):

> "As the policy insures against loss, it, of course, contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract, the company sends its agent into the state where the property was insured and where the loss occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the state."

If these principles be applied to the situation revealed by the motion papers presented to the Court on the motion to quash, it becomes manifest that denial of that motion is to be sustained on two grounds:

1. On the ground that the activities which those motion papers disclose constituted a doing of business sufficient to invest the courts of the state with jurisdiction over the cause of action in suit; and

2. On the ground that the instrument upon which the suit was based constituted an agreement available to the plaintiffs which estopped the defendants from denying either that it was doing such business or that it was subject to the jurisdiction of the courts of the state.

A.

The transactions had by the defendant within the state constituted a submission to its courts sufficient to sustain their jurisdiction over the cause of action involved in the case at bar.

It may be possible to assert that a corporation that has executed within the state a pledge of all its assets to secure an obligation payable within its borders, which has appointed a resident of the state as its agent to authenticate within the state the evidences of the obligations there secured, and to register their transfer, which has invested that agent with exclusive powers to perform these functions and which for a series of years has maintained a fiscal (*i. e.*, financial) office within the state where it has paid the interest on these obligations has not engaged in such a general conduct of its business within the state as to involve a submission to the courts of that state of all controversies, irrespective of their character or the *locus* of their origin.

But patently, however this may be, to contend that the performance of these acts does not constitute a doing of business such as to empower the courts of the state to enforce the contract arising out of them and with which they are connected, is to ignore the principle upon which the jurisdiction of foreign corporations is founded, and to establish an arbitrary rule unfounded in logic and inconsistent with fundamental principles of justice and plain dealing. Nor is there any warrant in the authorities for so extreme a position.

Indeed, precisely the contrary has been held in the only decision which we have been able to find in which the precise situation has been presented to the Courts, and it was there held that a series of

acts, differing from those in the case at bar only in particulars which rendered the argument in favor of the jurisdiction less potent than those in the case at bar, sufficed to confer it.

Watkins Co. v. *Elliott*, 62 Kansas, 291.

In this case the action was brought on a judgment rendered by a court of record in New York against a land mortgage company. The company was a corporation organized under the laws of Colorado. The suit in New York had been instituted by personal service of summons upon its president. In the New York courts it had interposed no appearance, and judgment by default had been entered against it. The following facts appeared in the action in the Kansas courts to enforce the judgment:

> "The action in New York, as shown by the transcript of judgment sued on, was on instruments called 'real estate debenture bonds.' These bonds showed on their face that they belonged to a certain designated series aggregating one hundred thousand dollars, all payable at the National Bank of Commerce, in the city of New York, and all secured by the assignment to and deposit with a trustee, to wit, The Farmers' Loan and Trust Company of New York, of an equal amount of real-estate mortgages. And it was further specified in the bonds that they did not become obligatory until the trustee had indorsed thereon a certificate of the fact that the specified amount of mortgage securities had been assigned to and deposited with it for the benefit of the holders of the debentures, in accordance with the terms of an agreement entered into between it and the mortgage company. In the case of the bonds sued on, the trustee had en-

dorsed thereon the required certificate. We think this showed a doing of business, a making of contracts, by the mortgage company in the state of New York. The bonds were payable at a designated agency in New York. This involved a remittance of money to the agency to meet the obligations at maturity; it involved a contract of employment, an agency of the one party for the other; it involved an accounting between them; it involved the incurrence of a liability enforceable by the principal against the agent in New York.

The bonds sued on also showed the making of a contract of trusteeship in New York, enforceable in that state. The execution of this contract involved the placing of valuable securities under the protection of the laws of New York and subject to the jurisdiction of the courts of that state. It involved relations between the creator of the trust, the trustee and *cestui que trust*, enforceable in the courts of New York. Now the making of the several contracts and the creation of the several relations mentioned were all shown by the record of the case in New York sued on in this state, and therefore we are entitled to presume, as a consequence thereof, the execution of such contracts and the carrying on of such relations; that is, to presume the transaction of the business the parties agreed to conduct.

The statutes of the state of New York, introduced in evidence upon the trial of the action in this state, authorized the service of process upon the president of a foreign corporation doing business in that state."

The J. B. Watkins Land Mortgage Co. v. *Cornelia U. Elliott,* 62 Kans., 291, at pp. 293-295.

Upon the basis of these facts it was held that the New York courts had acquired jurisdiction of the action, and that the judgment was valid.

It is to be observed that the facts therein stated differ from those presented in the case at bar only in that the bonds which were the subject of the action in that case were made payable at the office of an independent corporation, to wit, the National Bank of Commerce, in the City of New York, whereas, in the case at bar, they were made payable at a fiscal office to be maintained by the company in the City of New York—and that, hence, the facts in the case at bar are to that extent stronger in favor of the plaintiffs' contention than those presented in the Kansas case.

And the principle that the activities of a foreign corporation need not be extensive or continuous to confer jurisdiction over an action brought by a resident of a state to enforce a contract which has been entered into within the state, or which by its terms was to be performed within the state, is amply demonstrated by the decisions of this Court in:

Connecticut Mutual Life Ins. Co. v. *Spratley,* 172 U. S., 602.

Mutual Reserve Fund Life Assn. v. *Phelps,* 190 U. S., 147.

Penn Lumbermen's Ins. Co. v. *Meyer,* 197 U. S., 407.

In the first of these cases, the question involved was the *continuance* of business within the state on the part of an insurance company, and it was held that a company which had once come into the state for the purpose of doing business therein was continuing "to do business" therein by merely al-

lowing its contracts to remain in force and receiving the premiums thereon—in other words, that, having entered into executory contracts within the state, it was to be deemed to be subject to the jurisdiction of the courts of that state so long as the contracts remained alive, and until they had been performed.

And if this is true, with respect to an insurance company which has contracted to pay a sum of money under certain contingencies, it is difficult to perceive why it is not equally true with respect to any other sort of a corporation which has entered into a contract within the state to pay a fixed sum absolutely and at a definite time.

For, of course, the principle is not affected by the circumstance that in the one case the contract involves a part of the business which constitutes the main purpose of the corporate existence, while in the other it was entered into in the exercise of those incidental powers which are necessary to enable it to achieve its main purposes, since jurisdiction is conferred equally by the conduct of either class of transaction.

Pomeroy v. *Hocking Valley R. R. Co.*, 218 N. Y., 530, 538.
Washington-Virginia Ry. Co. v. *Real Estate Trust Co.*, 238 U. S., 185.

An equally convincing illustration of the principle is to be found in *Penn. Lumbermen's Insurance Co.* v. *Meyer* (*supra*), where an insurance company was held to be doing business sufficient to confer jurisdiction upon the courts of New York to enforce a contract of fire insurance made with a resident of the state, merely by sending adjusters within the state to appraise and if possible to agree

upon the extent of the loss, though the company had never attempted to secure authority to do business within the state, had never maintained any agency within the state, had never executed any policies, or accepted any applications therefor within the state, and had never had or sent any agents within the state to solicit risks except in so far as it had permitted its general manager to come within the state to make speeches at lumbermen's conventions in which he urged the advantages of insurance in the company.

And assuredly if the mere performance within the state of an act preliminary to the fulfillment of its contract made with a resident of the state, where the contract of itself was entered into and was to be performed without the state, constitutes a sufficient doing of business to confer jurisdiction, the pledge of the securities and the maintenance of an office within the state for the fulfillment of its contracts made therein and to be performed therein, must constitute such a "doing of business."

And, of course, if this is true, the fact that the office had been discontinued before the contract had been performed, cannot affect the jurisdiction; since, apart from the authorities above cited which conclusively establish that a submission to the jurisdiction once effected by doing business within the state may not thus be withdrawn, it would be manifestly shocking to the most elementary concepts of justice to hold that by failing to fulfill its contract to maintain a fiscal office within the State of New York the defendant could deprive its bondholders of the rights which would have accrued to them had that part of its contract been fulfilled.

Indeed, unless we misread the authorities and their effect, they establish the rule that whenever a foreign corporation comes within the state and

therein makes a contract with or for the benefit of one of its residents, which is to be performed therein, it thereby does business within the state sufficient to vest its courts with jurisdiction to enforce that contract, and thereby consents to submit itself to the jurisdiction of those courts whenever process is served upon any officer or agent thereof upon whom the laws of the state prescribe that service shall be made, provided only that he shall be of such character that notice served upon him may reasonably be expected to reach those officials of the corporation who are charged with the duty of protecting its interests.

> "We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that state, in suits founded on such contracts."
>
> *Lafayette Ins. Co.* v. *French,* 18 How., 404, at 408.

B.

The bonds themselves constituted a contract to submit to the jurisdiction of the New York courts, and the defendant is estopped to deny the jurisdiction of those courts.

It is to be observed that the stipulation in the bond is not merely that both interest and principal shall be paid in the City of New York—a stipulation which might consist with the continuous abstention of the corporation from any activity within the state—but that they are to be paid *at the fiscal office of the company in the City of New York,* and that thereby it was advertised that the company would maintain a financial office within the state, and to that extent at least do business

within the state. And when this undertaking is read, as of course it must be in connection with the statutes of the state which asserted the jurisdiction of the courts of the state over foreign corporations in suits brought by residents of the state (*Commercial Mut. Accident Co.* v. *Davis,* 213 U. S. 245, at p. 254), and which were obviously enforceable against any foreign corporation which undertook to avail itself of the privilege of transacting any business therein, it is impossible to conceive the promise to maintain a fiscal office within the state as anything other than an acceptance of the inevitable corollary to the performance of that promise, *i. e.,* as anything other than an agreement to submit to the courts of the state any controversy arising out of the terms of the bonds or the failure to fulfil those terms. In other words, the contract to maintain a fiscal office within the state—read in the light of the state laws—constituted the equivalent of an express promise to do business within the state such as would subject the corporation to the jurisdiction of the state courts in an action brought upon the bonds, and hence, as the equivalent of an express promise to submit such controversies to the jurisdiction of those courts.

And, of course, as we have pointed out above, such a contract is enforceable and suffices either to confer jurisdiction or to estop the corporation entering into it from denying the existence of the jurisdiction.

II.

Upon the record brought to the Court no questions are presented for review.

The right to a review in this court must be predicated upon one of four theories: (1) either that the order made by Judge HOUGH before the interposition of the answer is reviewable; (2) that the rulings made by Judge GRUBB upon the attempt to review that motion is reviewable; (3) that in some manner the question was presented by other proceedings had upon the trial; or (4) that the question is reviewable on the basis of the certificate of the Trial Judge, irrespective of the manner in which it was sought to be raised or the record upon which it was presented.

It remains, therefore, to ascertain whether upon either of these theories any reviewable ruling is brought before this Court.

I.

That the order denying the motion to quash made by Judge HOUGH before the interposition of the answer is not a subject of review in this court is settled beyond question—first, because it is an interlocutory order and, second, because an order denying a motion to quash is always discretionary.

The first of these propositions was held in *McLish* v. *Roff* (141 U. S., 661). The second is amply supported by the logic of the authorities. For it is generally held that the denial of a motion to quash is discretionary, since such an application involves an attempt to secure by a summary proceeding a determination of an issue which, unless the facts are clear, can be decided more adequately

and with a greater assurance that justice will be done through the interposition of a plea under which the rival views of the facts can be more deliberately and more satisfactorily presented and the truth more certainly ascertained; and that a court is therefore vested with a discretion to decline to dispose of the question in this fashion, and to remit the objecting party to the entirely adequate remedy of asserting his claim by means of a plea.

To quote the language of this Court:

> "As a motion to quash is always addressed to the discretion of the court, a decision upon it is not error and cannot be reviewed on a writ of error."
> *United States* v. *Hamilton*, 109 U. S., 63.

To be sure, this language was employed with respect to a motion to quash an indictment, but, the principle is equally applicable to the ruling upon any other pleading or process where the determination of the court is invoked in that form, and is especially applicable to rulings such as that which is here under consideration.

For, obviously, since the denial of the motion to quash establishes nothing final, and leaves it open to the defendant to raise the same question by a plea in abatement unembarrassed by the ruling made on his motion to quash, the denial of his motion imports nothing more than a refusal to dispose of his contention upon a summary application. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583.) And, manifestly, it would be absurd to regard other than as discretionary a ruling that the question sought to be litigated involves sufficient doubt or sufficient difficulty of proof to make it expedient that it be determined upon the basis of evidence produced in open court and of the testi-

mony of witnesses sifted by cross-examination, rather than upon the unrestrained allegations contained in affidavits made by interested witnesses. And equally clearly it would involve the gravest injustice to subject the plaintiff in a suit to a risk of a final denial of his rights at the end of a long litigation simply because he has succeeded in inducing the court of first instance to require that the defendant present his application in a manner such as to permit it to be adequately examined.

Moreover, to treat the ruling as reviewable, would lead to the unthinkable result that a plaintiff might and often would be thrown out of court on a ground which he had conclusively established to be without foundation. For the denial of the motion to quash does not debar the plaintiffs from producing upon the trial evidence of the jurisdictional facts or from establishing those jurisdictional facts by proof additional to that available to him when he was called upon to respond to the motion. And the evidence thus adduced upon the trial will often suffice to establish conclusively that the defendant corporation had been doing business within the state when the evidence which the plaintiff had been able to set forth in the affidavits in opposition to the motion to quash was insufficient to establish that fact. And, of course, the jurisdiction may be established by facts adduced upon the trial as well as by facts appearing in the pleadings or other parts of the record.

Sun Printing & Publishing Association v. *Edwards*, 194 U. S., 377, 383.

Under such circumstances, if the denial of the motion to quash were reviewable, in connection with a writ of error sued out to review the judg-

ment entered after the trial of the application, the court would be under the necessity of reversing a judgment entered in a court having jurisdiction both of the subject-matter and of the person of the defendant and entered upon a claim to which there was no defense upon the merits.

Nor can it be urged in answer to this last contention that in such a case the defect in the proof of jurisdiction presented on the motion would have been cured by the subsequent evidence offered on the trial. For that very contention necessarily concedes that that which is the subject of review is the entire record made upon the trial and not the record made upon the motion to quash; and that, hence, it is *not* the ruling upon the motion to quash which comes up for review, but the judgment and the sufficiency of the evidence upon which it has been founded.

Moreover, if the ruling upon the motion to quash were reviewable upon the writ of error sued out after the entry of judgment, the review might be obtained without submitting to the reviewing court the facts adduced upon the trial. For, obviously, a defendant may procure a writ of error to review only the matters appearing upon the face of the record and may procure to be sent to the reviewing court under the writ of error merely the matters thus appearing, since it lies with him and with him alone to determine whether he shall procure a bill of exceptions to be allowed and annexed to the transcript of the record; and hence, if the order is itself reviewable, it follows, as we have said above, that the plaintiff is subject to be defeated in an action to which there is no just defense, upon the theory that he has chosen the wrong forum, whereas upon the trial he has established that his choice

of the forum was as unimpeachable as his cause of action.

It may be suggested that this last argument applies only in a case where there has been a trial of the action, and that it has no persuasive effect in a case where a defendant who after the denial of his motion to quash has submitted to a default and has sued out a writ of error to review a record consisting solely of the papers presented on the motion to quash, the order entered thereon and the judgment rendered upon default subsequent thereto; and that, since this is so, if the argument were allowed any force in a case where a trial had been had, it would result in the anomalous conclusion that the order was to be regarded as discretionary in one case and as non-discretionary in another.

To such a contention the answer is that the argument above made is merely cumulative, and that the order is to be regarded as discretionary in either case, on the ground first stated, namely, that it decides nothing final and in any event leaves the issue to be litigated either upon the trial of the merits or upon the trial of a plea in abatement; and that upon a denial of the motion the defendant is put to his election either to interpose a plea in abatement or *voluntarily to accept* the decision of the motion as *a final determination* of the merits of his contention.

But, however this may be, it is clear that the record presented in the case at bar forecloses any claims of a right to review the order denying the motion to quash. For in the case at bar the defendant *did* file an answer and did go to trial, and he comes before this Court without any attempt to present through a bill of exceptions the record made upon the trial.

And since, in the absence of a bill of exceptions, there is nothing before this Court to establish that the record did not disclose that the corporation was doing business within the state, it follows that the Court will presume that those facts did appear in the record and that the judgment was justified.

Metropolitan Railroad Co. v. *District of Columbia*, 195 U. S., 322.

Nor can there be any doubt that the rules of practice thus advocated lead to salutary results, and that any departure from the rule which regards the denial of a motion to quash as discretionary, and which permits it to be reviewed even in connection with a review of the judgment in favor of the plaintiffs, can lead only to haphazard decisions and to delays and denials of justice.

For, obviously, to compel a plaintiff to litigate the issues upon which jurisdiction depends upon affidavits always involves a hardship. Ordinarily, the evidence through which the submission to the jurisdiction is to be established lies almost exclusively in the possession of the defendant, or is to be secured, if at all, from the mouths of those favorable to him and hostile to the plaintiff, and, ordinarily, therefore, even when the conduct of business has been open and notorious, the plaintiff can prove that fact only if he be accorded opportunity to procure witnesses and documents by subpoena and the further opportunity of establishing the truth by cross-examination, while, if this opportunity is denied him, his right to the forum is left to depend solely upon the elasticity of conscience or of definition in which the defendant's officers are prepared to indulge themselves.

The hardship thus involved is sufficiently acute when upon a litigation thus conducted he is denied his forum at the outset. But in that case, at all events, he is afforded the opportunity of proceeding with his litigation at the home of the corporation with little loss of time and effort. Furthermore, it is to be presumed that a court in the exercise of a wise discretion will not ordinarily grant the motion unless the case is a clear one. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583.)

But, if the denial of the motion is subject to review and the litigant who, upon being called to answer the motion, has been so unfortunate as to persuade the Court that he was right, is subject to have the ruling reviewed—so that after the lapse of years, and the expenditure of time, effort and money involved in litigating the merits of his case, he runs the risk of having all his labor rendered nugatory and his action dismissed upon an issue which he has never been accorded an opportunity properly to present—then the situation of the foreign corporation is indeed a favored one and the litigant who undertakes to pursue it anywhere but in the state of its origin, where oftentimes it has no assets and where usually he is accorded the choice of presenting his case imperfectly by means of testimony taken under commission or at a ruinous expense by taking his witnesses to the forum, is in a hard situation indeed.

On the other hand, the denial of a review of such an order imposes no hardship upon the defendant, for it can always re-raise the question by answer, and can always procure the issue to be submitted on the basis of the facts developed through an examination of its records and a cross-examination of its officials; and upon a record thus made, under conditions which afford the plaintiff a fair op-

portunity of establishing the facts, can by means of a bill of exceptions bring the question up for review.

2.

It needs no argument to establish that if the first order denying the motion to quash is not a reviewable order that made by Judge GRUBB is in the same category. For, as we have said, the application upon which it was based purported to be no more than an attempt to secure a review of Judge HOUGH's prior decision; and the ruling made upon that application can have no different standing from that made by Judge HOUGH. Beyond this the record discloses that Judge GRUBB neither permitted a renewal of the motion nor attempted to decide it, but declined to entertain it both because it had already been determined and because he regarded a motion to quash made after the interposition of an answer dealing with the merits as coming too late.

3.

Furthermore even if the application made to the Trial Judge could be regarded as an offer of evidence in support of the plea to the jurisdiction and his ruling therein could be conceived as a refusal to consider that evidence on the trial, the offer and the ruling would not be the subject of consideration before this Court for the reason that they are not incorporated in a bill of exceptions. And, we take it, no question of practice is more firmly established in this court than that it will not review a ruling made upon the trial unless a bill of exceptions has been framed and allowed in the form prescribed by law.

Jennings v. *Phil. & Balto. Railway Co.*, 218 U. S., 255, 256.
Michigan Ins. Bank v. *Eldred*, 143 U. S., 293, 298.

4.

It remains to be considered, therefore, only whether the question is to be deemed to be reviewable in this court merely by virtue of the provisions of the statute to the effect that "appeals or writs of error may be taken from the District Courts * * * to the Supreme Court * * * in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision" (Act of March 3rd, 1891, Judiciary Code, § 238).

That this question is to be answered in the negative is clear upon the authorities, for it is established that the statute does not authorize a review of every decision involving the jurisdiction of the court, but only of rulings made in a form in which they would ordinarily be reviewable. Thus it has been held that a writ of error will not lie to review the order denying the motion to quash where the writ of error has been sued out before final judgment in the case (*McLish* v. *Roff*, 141 U. S., 661), or even after the entry of a decree *pro confesso* subsequent to a denial of a motion to vacate (*Chappell* v. *O'Brien*, 22 App. D. C., 191, 193).

And in the same way it was held under the old practice permitting a review upon a certificate of division in the court below that the review was limited to determinations which were in their nature reviewable, and, hence, that this Court would

not review an order denying a motion to quash an indictment, though the question was certified to it (*United States* v. *Hamilton,* 109 U. S., 63); and that this rule was to be enforced, even though the motion was based upon a claim of lack of jurisdiction in the court below (*United States* v. *Avery,* 13 Wall., 251, 253), and that it applied whenever the ruling thus sought to be brought before the court was of a discretionary nature (*Smith* v. *Vaughan,* 10 Peters, 366; *Packer* v. *Nixon,* 10 Peters, 408, 411).

And, finally, it has been held, if we understand the decision of this Court aright, that, while the certificate of the trial judge may suffice to establish how the question of jurisdiction has been sought to be raised, this Court will review the ruling thus made in the absence of a bill of exceptions only if it appeared that all "the elements necessary to decide the question are in the record" and that the ruling could not have been affected by evidence adduced on the trial (*Nichols Lumber Co.* v. *Franson,* 203 U. S., 278, 282-283); or, in other words, that a bill of exceptions may be dispensed with and a ruling in support of the jurisdiction may be reviewed on the basis of the certificate and the record only when it is clear that a bill of exceptions could "have added nothing to what is patent on the face of the record."

> *Grant Shoe Co.* v. *W. M. Laird Co.,* 212 U. S., 445, 447.

It follows, therefore, that where, as in the case at bar, a trial has been had after the denial of the motion to quash, the court will in no event review the ruling thus made in the absence of a bill of exceptions, since upon a record thus presented to

it it is not advised that all the jurisdictional facts were not established on the trial, and that any failure to establish those facts upon the motion was not remedied through the evidence adduced on the trial.

It follows, therefore, that no right of review is conferred by the certificate of the trial judge in the case at bar, unless the question sought to be certified was raised and determined in a proceeding of a reviewable nature; and that, hence, if we are right in our contention that the orders denying the motion to quash were discretionary, or in our contention that in any event the question sought to be raised thereby could be brought before this Court only upon a record which included a bill of exceptions, it follows that the question is not presented in reviewable form and that the judgment of the Court below should be affirmed.

III.

By procuring the orders extending the time to answer, demur or make any motion concerning the complaint, the defendant waived any right to object to the jurisdiction.

It is established that a defendant who becomes an "actor in the proceeding" thereby subjects himself to the jurisdiction and thereby waives the right to object to the exercise thereof in the action in which he has invoked it.

> *Merchants Heat & L. Co.* v. *Clow & Sons,* 204 U. S., 286, 290.

The precise steps which constitute becoming an actor in the proceeding are said to be in doubt,

but it is submitted that the governing principle must be that a litigant may not blow hot and cold, and that he may not invoke the powers of the court in his behalf, and in the same breath or thereafter deny that it has any power to act to his disadvantage. To be sure, he is not debarred from challenging the jurisdiction by action such as is necessary to insure him the forum to which he is entitled or by steps of a purely defensive nature undertaken after the challenge to the jurisdiction has been overruled, and hence he loses nothing either by removing the case to the federal courts with or without a preliminary reservation, nor by interposing an answer on the merits, after reserving them, but it is difficult to perceive how he can properly be said not to have become an actor in the proceeding when he invokes the power of the court merely to stay the plaintiff in the prosecution of the rights which the law accords him if the court has jurisdiction to enforce them. For by so doing he procures the court to exercise its powers directly in his behalf and to his opponent's detriment without reference to the existence or merits of any defense to the claim asserted.

By this we do not mean to be understood as urging that every application for an extension of the time to plead and acceptance of the time thus conferred would constitute a waiver of lack of jurisdiction over the person. For we recognize of course that the principle which permits a defendant to answer after the motion to quash has been denied, without thereby waiving his right to question the jurisdiction carries with it as a necessary corollary a right to secure such time as may be *necessary* to enable him to interpose the answer. But we do contend that unless the time is sought and granted *on the ground of such necessity,* it does constitute

a waiver of the right to object to the jurisdiction, and that a defendant may not for his own mere convenience, or for the mere advantage of securing that delay which is often a denial of justice, invoke the power of the court to stay the hand of the plaintiff and still insist that the court is without jurisdiction to act in the plaintiff's behalf.

Nor, it is to be observed, will the application of this principle defeat or impair the defendant's rights under his motion to quash. For if, pending the decision of the motion, he interposes his answer, he loses nothing. If the motion is granted, it ends the action; if it is denied, the action stands precisely in the position in which it would have stood but for his ill-founded application. Thus the principle invoked imposes on him nothing save that he shall not utilize the motion merely to hinder and delay the plaintiff.

The advantage of such a rule is strikingly illustrated by the procedure in the case at bar, where the defendant, by means of the motion and orders extending the time to answer, secured merely as an incident thereto and without any pretense that it required any time for the preparation of the pleading, secured nearly three months' delay in answering the complaint, and then interposed an answer which upon the trial, thereby delayed for another eight months, he made no attempt to substantiate.

We are aware, of course, that there are decisions of the lower courts and of other jurisdictions which run counter to this contention, and that cases have arisen in this Court where the question was ignored; but we have been unable to find any case in this Court where the matter was considered, and we are, therefore, emboldened to make the argument in the view that its adoption may settle a

practice whereby one of the law's delays will be obviated.

POINT IV.

If the Court should hold that the question is reviewable and that the facts disclosed by the affidavits were insufficient to establish the jurisdiction of the court, it should remand the case with directions that the issues be sent to a Master to the end that the defendants be afforded an opportunity of developing such further facts as may be available to them in support of their contention.

Otherwise, the plaintiffs will have been deprived entirely of their day in court.

Respectfully submitted,

HOWARD S. GANS,
Of Counsel for the Plaintiffs,
Defendants-in-error.

APPENDIX.

Code of Civil Procedure (New York).

SECTION 1780. *When foreign corporation may be sued.*

An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this State.

SECTION 432. *How personal service of summons made upon a foreign corporation.*

Personal service of the summons upon a defendant, being a foreign corporation, must be made by

delivering a copy thereof, within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

4. If the person designated as provided in section 16 of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the State and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, process against the corporation in an action upon any liability incurred within this State, or if the corporation has property within the State, may after such death, removal or revocation and before another designation is made, be served upon the secretary of state.

SECTION 421. *Appearance of defendant.*

The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney.

SECTION 422 (Am'd 1877). *When defendant must answer before time to appear expires.*

A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer upon the plaintiff's attorney, before the expiration of the time, within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in section 479 of this act.

Banking Law.

Chapter 696 of the Laws of 1893 of the State of New York amends *Section 156 of Chapter 689* of the Laws of 1892 so as to read as follows:

"§ 156. *Powers of corporation.*—Upon the filing of any such certificate of authorization of a trust company, the persons named therein and their successors shall thereupon and thereby become a corporation and in addition to the powers conferred by

the general and stock corporation laws, shall have power:

* * * * * *

"No such corporation shall transact its ordinary business by branch office in any city not named in its certificate of incorporation or charter as the place where its business is to be transacted."

General Corporation Law.

(In force in 1901.)

SECTION 15. *Certificate of authority of a foreign corporation.*

No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December thirty-first, eighteen hundred and ninety-two, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this

state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive.

SECTION 16. *Proof to be filed before granting certificate.*

Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the State, and a place within the State which is to be its principal place of business, and designating in the manner prescribed in the code of civil procedure a person upon whom process against the corporation may be served within the state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the state. Such designation shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state. If the person so designated dies or removes from

the place where the corporation has its principal place of business within the state, and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation may, after such death or removal, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him.

TOLEDO RAILWAYS & LIGHT COMPANY *v.* HILL ET AL., EXECUTORS OF KIRK.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 200. Argued April 23, 1917.—Decided May 21, 1917.

An objection to the jurisdiction of the District Court based on the defendant's being a corporation not doing business in the State and upon want of representative capacity in the person served, is not waived by answering to the merits after a motion to quash the service is overruled, where the answer reasserts the jurisdictional point also, where the defendant participates in the trial only by reiterating the objection and where the judge presiding treats the ruling on the motion as conclusive because made by an associate.

Provision made by a corporation for payment of its bonds and coupons at an office in a particular State and payment of coupons accordingly does not constitute such a doing of business in that State as renders the corporation liable to be sued there. So *held* where the action was upon some of the bonds.

There is no merit in the proposition that as a basis for determining jurisdiction the property of a corporation must be regarded as translated from its home State to another State when mortgaged to a trust company of the latter to secure bonds made payable there.
Reversed.

THE case is stated in the opinion.

Mr. Robert Burns, with whom *Mr. Charles A. Frueauff* was on the brief, for plaintiff in erorr.

Mr. Howard S. Gans, with whom *Mr. Paul M. Herzog* and *Mr. Arthur S. Levy* were on the briefs, for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Averring themselves to be citizens of the United States, the one residing in the City of New York and the other in Boston, Massachusetts, the defendants in error in April, 1914, sued in the Supreme Court of the State of New York to recover from the plaintiff in error the principal and interest of certain bonds issued by the plaintiff in error, alleged to be a corporation created by the laws of Ohio. The summons was served upon a director and vice-president of the corporation residing in the City of New York. The corporation, appearing specially for that purpose, on the ground of diversity of citizenship removed the cause to the District Court of the United States for the Southern District of New York and, on the filing of the record in that court, again solely appearing for such purpose, moved to vacate the service of summons on the ground that the corporation was created by the laws of the State of Ohio, and was solely engaged in carrying on its business at Toledo in that State, that is, in the operation of street railways and the furnishing of electrical energy for light and other purposes. The motion to vacate expressly alleged that the corporation was prosecuting no

business in the State of New York and that the person upon whom the summons was served, although concededly an officer of the corporation, had no authority whatever to transact business for or represent the corporation in the State of New York. On the papers, affidavits and documents submitted the motion to vacate was refused and an answer was subsequently filed by the corporation setting up various defences to the merits and besides reasserting the challenge to the jurisdiction. At the trial, presided over by a different judge from the one who had heard and adversely disposed of the challenge to the jurisdiction, the court, treating the ruling on that subject as conclusive, declined therefore to entertain the request of the corporation to consider the matter as urged in the answer. After this ruling the corporation refused to take part in the trial on the merits except to the extent that by way of objections to evidence, requests for rulings and instructions to the jury it re-stated and re-urged its previous contention as to jurisdiction. There was a verdict and judgment for the plaintiff and this direct writ of error to review alone the ruling as to jurisdiction was prosecuted, the record containing the certificate of the trial judge as required by the statute.

Upon the theory that as there was diversity of citizenship the challenge to the jurisdiction involved merely authority over the person, it is insisted that even if the objection be conceded to have been well taken, it was subject to be waived and was waived below and therefore is not open. This must be first disposed of. The contention rests upon the proposition that because after the motion to vacate had been overruled an answer to the merits was filed, therefore the right to assail the jurisdiction was waived. But this disregards the fact that the answer did not waive, but in terms reiterated, the plea to the jurisdiction. It further disregards the fact that the court treated the subject as not open for consideration

because of the previous ruling on the motion to vacate. Moreover, as it has been settled that the right to review by direct writ of error a question of jurisdiction may not be availed of until after final judgment (*McLish* v. *Roff*, 141 U. S. 661), it follows that the contention must be either that there is no right to review at all or that it can only be enjoyed by waiving all defence as to the merits and submitting to an adverse judgment. The contention, however, has been conclusively adversely disposed of. *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218.

Leaving aside the capacity of the person upon whom the summons was served, which we shall hereafter consider, the facts upon which the question of jurisdiction depends are briefly these: The corporation was created by the laws of the State of Ohio, had its principal establishment and business at Toledo and carried on no business in the State of New York unless the contrary conclusion results from the following statement: In 1901 the corporation issued its bonds and secured the same by mortgage. The trustee under the mortgage was The United States Mortgage and Trust Company of the City of New York and the bonds were delivered to that company to be certified in accordance with the provisions of the deed. The bonds were subject to registry and became due and were payable on July 1, 1909, "at the fiscal office of said Company in the City of New York" and the semi-annual interest coupons were also payable "at the fiscal office of said Company in the City of New York." Prior to 1909, when the company defaulted in the payment of the principal and interest on its bonds, the interest coupons were paid at the office of a commercial firm in New York representing the company for such purpose, but that representation wholly ceased after the default and from that date until this suit was brought, about five years later, the company had no office for any purpose in the State of New York and transacted no business therein.

The reason which controlled the court below and the sole contention here relied upon therefore was and is that the provision for the payment of the bonds and coupons at an office in the City of New York constituted a doing of business in New York so as to afford jurisdiction there and that such result continued to operate years after the office for such purpose had ceased to exist upon the ground that, for the purpose of jurisdiction over the corporation, it must be conclusively presumed to have continued to maintain an office in the City of New York for the purpose stated. But we think from either point of view the contention is without merit: The first because the mere provision for a place of payment in the City of New York of the bonds and the coupons annexed to them at their maturity and their payment at such place was in no true sense the carrying on by the corporation in New York of the business which it was chartered to carry on, however much it may have been an agreement by the corporation to pay in New York an obligation resulting from the carrying on by it of its business in the State of Ohio. And this view necessarily disposes of the proposition in the second aspect, since the indulging in the fiction of the existence of an office for the payment of coupons could not produce an effect greater than that which could be produced by the real existence of the office.

So far as concerns the capacity of the person upon whom the summons was served irrespective of the doing of business by the corporation in the State, we do not expressly notice the various contentions by which under such a view jurisdiction is sought to be supported, but content ourselves with saying that we think they are all plainly without merit.

Although what we have said in substance meets and disposes of all the contentions relied upon to sustain the jurisdiction, we have not expressly noticed them all because of their obvious want of merit,—a situation which

is illustrated by the mere statement of a contention made that as the trustee under the mortgage was a New York corporation in whom the title to the mortgaged property for the purposes of the trust was vested, therefore all the property of the corporation must be metaphysically considered to have been translated from the State of Ohio to the State of New York and used as a basis of jurisdiction in such latter State.

Reversed and remanded with directions to dismiss the complaint for want of jurisdiction.